Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTORER TERM, 1975

NO. ~~75~~-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STUART M. NELKIN
A Member of the Bar of the
Supreme Court of the United States
4635 Southwest Fwy., Suite 320 W
Houston, Texas 77027
(713) 621-9923

HENRY M. ROSENBLUM
4635 Southwest Fwy., Suite 320 W
Houston, Texas 77027
(713) 629-0650

ROBERT B. O'KEEFE
4635 Southwest Fwy., Suite 320 W
Houston, Texas 77027
(713) 629-0650

Counsel for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners L. N. McDonald and Raymond Laird respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 21, 1975.

OPINION BELOW

The opinion of the Court of Appeals, a copy of which appears in the Appendix attached hereto, is reported at 513 F.2d 90. The opinions rendered by the United States District Court for the Southern District of Texas are unreported and appear in the Appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. §1981.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§2000e-2(a)(1) Unlawful employment practices—

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

United States Code, Title 42

§1981 Equal Rights under the law—

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On September 26, 1970, Petitioners, who are white, were accused by the Respondent of having misappropriated certain of the Respondent's property. A black employee was similarly accused. On October 2, 1970, following an investigation by the Respondent, the Petitioners were terminated but the black employee was not.

On October 8, 1970, Petitioner McDonald initiated a grievance in which the charges of misappropriation were emphatically denied.[1] On April 3, 1971, Petitioner McDonald was notified that his discharge had been sustained and that his grievance would not be further pursued.

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1. Appendix F, p. 49.

On April 26, 1971, Petitioner McDonald filed a Charge of Discrimination with the Equal Employment Opportunity Commission in which he charged that his race had been a factor in the employment decision of Respondent to discharge him.

On August 16, 1971, Petitioners initiated an action against Respondent in the United States District Court for the Southern District of Texas invoking the Court's jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981. Following discovery and certain Motion Practice, Petitioners filed their Second Amended Complaint on July 19, 1973.[2]

On January 4, 1974, the District Court denied Motions to Dismiss. At issue in the Motion was (1) the proposition of whether white persons may bring an action under 42 U.S.C. § 1981,[3] and (2) the proposition that the Plaintiffs who were discharged following their apprehension for the theft of their employer's property, while an equally guilty Negro employee was retained because of his race, have not stated a claim under Title VII.[4]

On May 2, 1974, the District Court issued a second Memorandum and Opinion in which it held that "[42 U.S.C.] §1981 is inapplicable to white persons";[5] additionally, the Court held "[T]hat the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted".[6]

2. See, Plaintiff's Second Amended Complaint, Appendix G.
3. Appendix D, p. 35.
4. Appendix D, p. 36.
5. Appendix C, p. 30.
6. Appendix C, p. 33.

The District Court apparently predicated its decision, in part, on the finding that Petitioners had failed to allege that they were falsely charged with misappropriating company property. This finding was adopted by the United States Court of Appeals for the Fifth Circuit.[7] In fact, evidence of each Petitioner's innocence of the charges of misappropriation had been squarely presented to the District Court.[8]

On appeal to the United States Court of Appeals For The Fifth Circuit the Fifth Circuit panel held, *per curiam*, that 42 U.S.C. §1981 "confers no actionable rights upon white persons," and "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. §§2000e *et seq.*"[9]

The Petitioners were never afforded an opportunity by the District Court to offer evidence that (1) they were innocent of the accusations, or that (2) the not-discharged black employee was equally culpable, and that (3) race was a factor considered by Respondent in their discharge.

7. "There is no allegation that the Plaintiffs were falsely charged." *McDonald v. Santa Fe Trail Transportation Company*, 513 F.2d 90 (1975).

8. As to Petitioner McDonald:
"These [C]harges are wrong and are unjust, because I did not steel [sic] anything. . ." Appendix F, p. 49.
As to Petitioner Laird:
"Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules." Appendix E, p. 39.

9. Appendix A, p. 23.

THE COURTS BELOW CLEARLY DISREGARDED CONGRESSIONAL INTENT AND DECISIONS OF THIS COURT IN FINDING THAT PETITIONERS HAD FAILED TO STATE A CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED 42 U.S.C. §§2000e, ET SEQ.

Title VII of the Civil Rights Act of 1964 was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of the race, color, religion, sex or national origin". *Alexander v. Garnder-Denver Co.*, 415 U.S. 36, 41, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct., 849, this Court examined Congressional intent to determine the scope of Title VII and found that discriminatory preferences for minority employees, as well as for majority employees, were intended to be proscribed by the Act:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority *or majority*, is precisely and only what Congress has proscribed. (Emphasis supplied)

401 U.S. at 431.

Thus, the important question to consider in a case involving racial discrimination brought pursuant to Title VII is "whether, for any reason, a racially discriminatory employment decision has been made" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

In *McDonnell Douglas Corp., v. Green, supra*, this Court highlighted the important societal interest in fair and racially neutral employment decisions:

> There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by the employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

411 U.S. at 801.

On this basis, federal courts facing claims of racial discrimination in employment have closely scrutinized the employment decisions of the charged employer to determine if the employer has placed more stringent requirements on employees because of their race. *See, e.g., Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974); *McRae v. Goddard College*, ___ F.Supp. ___, 10 FEP Cases 143, 149 (D.C. Ver. 1975); *Martin v. Chrysler Corporation*, ___ F.Supp. ___, 10 FEP Cases 329, 332 (E.D. Mich., 1974); Also, CCH EEOC Decision No. 74-25 § 6400 (1973) and CCH EEOC Decision No. 74-95 § 6432 (1974).[10] The purpose of this judicial inquiry is to consider whether the employer's conduct was a mere pretext for the sort of discrimination prohibited by Title VII. *McDonnell Douglas Corp. v. Green, supra; Long v. Ford Motor Company, supra.* Particularly relevant to this determination is whether the

10. This Court has previously noted that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference". *Griggs v. Duke Power Company, supra*, 401 U.S. at 433.

employer has applied the challenged employment policy equally to similarly situated employees of other races. *McRae v. Goddard College, supra.* In *McDonnell Douglas Corp., v. Green, supra,* a case involving an alleged discriminatory refusal to rehire, this Court had occasion to emphasize the importance of such evidence to a claim of racial discrimination:

> Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact a pretext. *Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired.* (Emphasis supplied)

411 U.S. at 804.

Like the Plaintiff in *McDonnell Douglas Corp. v. Green, supra,* Petitioners alleged that they were the victims of a racially motivated employment decision.[11] The employer answered that Petitioners were justifiably discharged for alleged unlawful activity against the company. The District Court, in its first Memorandum and Order dated January 4, 1974, showed concern over whether Petitioners had stated a claim upon which relief could

11. See, Plaintiff's Second Amended Complaint, Appendix G.

be granted.[12] However, since the District Court found this issue to be inadequately briefed, the Court felt constrained to deny defendants' motion to dismiss. In a subsequent opinion, dated May 2, 1974, the District Court, upon reconsideration of its earlier opinion, concluded:

> Upon reconsideration, the court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which relief can be granted.[13]

On appeal, the United States Court of Appeals for the Fifth Circuit joined in this determination:

> We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief can be granted.[14]

513 F.2d at 90

In finding that Petitioners had failed to state a claim upon which relief can be granted both Courts relied heavily on this Court's decision in *McDonnell Douglas Corp. v. Green, supra.* In particular, the lower federal courts apparently found the following language to be decisive:

12. See, Memorandum and Order, Appendix D. The first opinion of the District Court was issued pursuant to Motions to Dismiss filed by Defendants Santa Fe and International Brotherhood.

13. See, Memorandum and Order, Appendix C, p. 34.

14. See Appendix A, p. 23.

> Nothing in Title VII compels an employer to absolve and rehire one who has engaged in unlawful activity against it.

411 U.S. at 803

However, both Courts ignored this Court's caveat in *McDonnell Douglas, supra,* that the defense of discharge for unlawful activity against the company is not a complete defense in and of itself, but merely serves to rebut Petitioners' allegation of disparate and discriminatory disciplinary treatment. Indeed, this Court commanded that the "inquiry must not end here" and directed that "On remand, . . . respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact a pretext." *Id.,* 411 U.S. at 804.

The fact that Petitioners were discharged for alleged unlawful activities does not obviate the employer's duty under Title VII, to maintain a neutral posture in making its employment decisions and to insure that their employment terms do not vary according to race for similarly situated employees. *See, e.g., Long v. Ford Motor Company, supra.*

As this Court astutely observed in *McDonnell Douglas Corp. v. Green, supra*:

> Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, *but only if this criterion is applied alike to members of all races.* (Emphasis supplied)

411 U.S. at 804.

In finding that Petitioners had failed to state a claim upon which relief can be granted, it was necessary for the District Court to find that Petitioners could prove "no set of the facts in support of his claim which would entitle him to relief". *Conley v. Gibson,* 355 U.S. 41, 46, 2 L.Ed.2d 80, 78 S. Ct. 99 (1957). It is difficult if not impossible to imagine, in light of this Court's clear holding in *McDonnell Douglas Corp. v. Green, supra,* that Petitioners could prove no set of facts which would entitle them to relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

If Petitioners had been afforded an opportunity to show, as their pleadings alleged, that their employment terms varied from similarly situated employees of other races and it was this variance which was fatal to their employment, then it is submitted that a prima facie case of racial discrimination would have been established. *See e.g. McDonnell Douglas Corp. v. Green, supra; Long v. Ford Motor Company, supra; McRae v. Goddard College, supra.* Likewise, if Defendant could have shown, as their pleadings alleged, that Petitioners were discharged solely for their alleged unlawful activity against the company, then the burden would have shifted back to Petitioners. *McDonnell Douglas Corp., supra.*

However, the District Court did not give Petitioners the opportunity to show by competent evidence that the stated reason for discharge was in fact a mere cover-up for a racially discriminatory employment decision. Instead, the Court decided, that even if Petitioners could have shown, as they alleged, that their race was the determinative factor in deciding to discharge them, and not the similarly charged black employee, they would not be entitled to relief under Title VII. One cannot help but

wonder if the result would have been the same if the discharged Petitioners were black and the retained employee was white.[15]

The mandate of Title VII is clear in directing its thrust at eliminating employment decisions arising from a discriminatory preference for either minority or majority employees. In failing to recognize this, the Courts below have committed a serious omission which has operated to deprive petitioners of those very rights which Title VII was enacted to secure. On this basis, the decisions of the courts below, in finding that white employees who were dismissed for alleged misappropriation of company property while a similarly charged black employee was not dismissed, had failed to state a claim upon which relief could be granted under Title VII, is not justified and cannot be allowed to stand.

THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1866, 14 STAT. 27, COMPELS THE CONCLUSION THAT WHITE EMPLOYEES HAVE STANDING TO CHALLENGE RACIALLY DISCRIMINATORY EMPLOYMENT POLICIES AND PRACTICES UNDER 42 U.S.C. §1981

After the adoption of the Thirteenth Amendment, Congress confronted the practical consequences of abolishing slavery by enacting enabling legislation pursuant to Section 2 of the new Amendment. In its original form, 42 U.S.C. §1981 was a part of this legislation designed to protect the rights secured to all Americans by the sweep-

15. The decisions of the Courts below, if left standing, could result in the perilous determination by future federal courts that Title VII does not protect whites from an employer's discriminatory preference for similarly situated minority employees.

ing terms of the Thirteenth Amendment.[16] Although 42 U.S.C. §1981 provides that "all persons . . . shall have the same right to make and enforce contracts, . . . and to the full and equal benefit of all laws for the security of persons and property *as is enjoyed by white citizens* . . ." (Emphasis supplied) this does not mean that only nonwhites may sue under §1981. To the contrary, from a review of the relevant legislative history of §1 of the Civil Rights Act of 1866, 14 Stat. 27, from which §1981 was ultimately derived, it is abundantly clear that the phrase—"as is enjoyed by white citizens"—was not intended to restrict the availability of this cause of action to nonwhites.

When construing §§1981 and 1982, this Court has relied heavily upon legislative history to determine the intent and scope of the Civil War Statutes. *See, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-44, 20 L.Ed.2d 1189, 1197-1200, 88 S.Ct. 2186, (1968) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 24 L.Ed. 386, 392, 90 S.Ct. 400 (1969).

16. Act of April 9, 1866, c. 31, §1, 14 Stat. 27, re-enacted by §16 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, §16, 16 Stat. 140, 144, and codified in §§1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§1981 and 1982.

Section 1 provided in relevant part:

> "[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and given evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The congressional intent of the Civil Rights Act of 1866 is best explained in the words of Senator Lyman Trumbull of Illinois, a principle draftsman of both the Thirteenth Amendment and the 1866 Act, and Chairman of the Senate Judiciary Committee. The civil rights bill, he explained, was "intended to give effect" to the Thirteenth Amendment by securing *"to all persons* within the United States practical freedom." (Emphasis supplied) Cong. Globe, 39th Cong., 1st Sess. 366 (1866). The scope of the Civil Rights Act of 1866 is revealed in the comments of Senator Trumbull during floor debate on the bill. In response to a charge by one of the bill's opponents that it was outrageous to provide federal protection for blacks that had never been accorded to whites, Senator Trumbull made it quite explicit that the bill was intended to protect the rights of whites, as well as blacks. The Senator stated:

> *"Sir, this bill applies to white men as well as black men.* It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what fact can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?"[17] (emphasis supplied).

Cong. Globe, 39th Cong., 1st Sess. 599 (1866).

Nor is there anything in the debates in the House that would contradict the Senate's understanding of the scope of the bill. *See,* the remarks of Congressman James F. Wilson of Iowa the bill's floor manager, Cong., Globe, 30th Cong., 1st Sess. 1115 (1866).

As stated above, 42 U.S.C. §1981 and §1982 were both derived and codified from §1 of the Civil Rights Act of 1866 which was intended to be permanent and inclusive of all races. Obviously then, these statutes should be construed consistently. In *Jones v. Alfred H. Mayer Co., supra,* this Court breathed new life into the Civil War statutes, long neglected, by holding that §1982 prohibited the respondent from refusing to sell a house to the petitioner, a negro, because of petitioner's race. In so holding, this Court clearly stated that if §1982 was to be given the scope that its origins dictated, then §1982 was to be accorded a sweep as broad as its language. *See, Jones, supra,* 392 U.S. at 437, 20 L.Ed.2d at 1206.

Moreover, this Court in its decision of *Sullivan v. Little Hunting Park, Inc., supra,* referred to its discussion of the legislative history of §1982 contained in *Jones* and stated:

> A narrow construction of the language of §1982 would be quite inconsistent with the broad and

17. This Court has previously relied on the comments of Senator Trumbull when deriving the intent and scope of the 1866 Act, and quoted lengthy excerpts of the Senator's floor debate concerning the Civil Rights Act of 1866. *See, Jones v. Alfred H. Mayer Co.,* 392 U.S. at 429-30, 431-32, 20 L.Ed.2d 1202-03 (1969).

> sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866, 14 stat. 27, from which §1982 was derived.

396 U.S. at 237.

Certainly this statement applies with equal force to the companion statute, §1981, since it too was derived from §1 of the Civil Rights Act of 1866.

In *Sullivan, supra,* this Court was squarely confronted with the question of whether a white person had standing to sue under 42 U.S.C. §§1981 and 1982. Sullivan, a white person, alleged that he had been expelled from a corporation which operated community recreational facilities solely because he had leased his house and assigned his membership share in the corporation to a black person. He sued for injunctive relief and damages under 42 U.S.C. §§1981 and 1982. This Court held that "Sullivan has standing to maintain this action". Although the Court referred explicitly to §1982 in setting forth the rationale for its opinion, *see,* 396 U.S. at 237, it did not limit its holding on the standing issue to §1982 alone. Thus, this Court has implicitly recognized that it is appropriate for a white person to sue under 42 U.S.C. §1981.

In light, then, of its legislative history, it is quite clear that §1981 should not be read as only providing a cause of action for non-whites. The phrase—"as is enjoyed by white citizens"—was apparently intended only "to emphasize the racial character of the rights being protected", *Georgia v. Rachel,* 384 U.S. 780, 781, 16 L.Ed.2d 925, 933, 86 S.Ct. 1783 (1966), and not to impose a limitation upon the scope of the protection afforded by §1981 to "all persons within the jurisdiction of the United

States". 42 U.S.C. §1981. Although the rights enjoyed by whites are used as a measuring stick under §1981, whites themselves may be denied rights which are normally available to members of their race. When that occurs, within the scope of activities protected by §1981, it provides white persons with a cause of action.

Thus, it remains for this Court to restore the protection of 42 U.S.C. §1981 to all persons, white and non-white, who are the victims of racial discrimination in employment. Petitioners submit that this case provides an ideal opportunity for the Court to consider this pressing question.

THIS COURT SHOULD FINALLY RESOLVE THE UNCERTAINTY AND CONFLICT IN THE LOWER COURTS AS TO WHETHER WHITE PERSONS HAVE STANDING TO CHALLENGE RACIALLY DISCRIMINATORY EMPLOYMENT POLICIES

In May of 1975 this Court joined the federal courts of appeal in holding that §1981 affords a federal remedy against discrimination in employment on the basis of race. *Johnson v. Railway Express Agency,* 44 L.Ed.2d 295, 301 (1975). This holding, considered in conjunction with the legislative history of the Civil War statutes, dictates that white persons be accorded protection against racial discrimination in employment under §1981. However, despite the clear mandate provided by Congress and the holdings of this Court, some lower courts have been reluctant to make the benefits of this statute available to all persons equally. Consequently, there is a division in lower court holdings as to whether white persons are entitled

under 42 U.S.C. §1981 to challenge discriminatory employment practices. Some courts have held that §1981 does not grant a cause of action to white persons. *See e.g. Perkins v. Banster,* 190 F.Supp. 98 (D. Md.), aff'd 285 F.2d 426 (4th Cir. 1960); *Kurylas v. U. S. Department of Agriculture,* 373 F.Supp. 1072 (D.C. D.C. 1974); and *Van Hoomissen v. Xerox Corp.,* 368 F.Supp. 829 (N.D. Cal. 1973). Other courts have held that §1981 does indeed protect white persons as well as non-whites. *See e.g. Dematteis v. Eastman Kodak,* 511 F.2d 306 (2nd Cir. 1975); *Cannon v. Action,* 303 F.Supp. 1240 (E.D. Mo. 1965), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971); *WRMA Broadcasting Co. v. Hawthorne,* 355 F.Supp. 577 (M.D. Ala. 1973); and *Hollander v. Sears, Roebuck & Co.,* 392 F.Supp. 90, (D. Conn. 1975).

In view of the unsettled state of the law on this question, and the split in the decisions of the Circuit courts, it is incumbent upon this Court to lay to rest any doubts that exist as to whether the protection of 42 U.S.C. § 1981 is to be extended to white persons. Petitioners respectfully submit that this Court could find no finer vehicle for the consideration of this question that the fact situation presented in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

STUART M. NELKIN
4635 Southwest Freeway
Suite 320 West
Houston, Texas 77027

HENRY ROSENBLUM
4635 Southwest Freeway
Suite 320 West
Houston, Texas 77027

ROBERT B. O'KEEFE
4635 Southwest Freeway
Suite 320 West
Houston, Texas 77027

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. James P. Wolf, Dixie, Wolf & Hall, Suite 401, 609 Fannin St., Houston, Texas 77002 and Mr. Benjamin R. Powel, 808 Sealy & Smith Professional Building, P. O. Box 629, Galveston, Texas 77550, counsel for the Respondent. I further certify that all parties required to be served have been served.

APPENDIX A

L. N. McDONALD and Raymond Laird,
Plaintiffs-Appellants,
v.
The SANTA FE TRAIL TRANSPORTATION COMPANY et al., Defendants-Appellees.

NO. 74-2813.

United States Court of Appeals,
Fifth Circuit.

May 21, 1975.

Action was brought by discharged white employees claiming violation of their civil rights. The United States District Court for the Southern District of Texas, at Houston, Carl O. Bue, Jr., J., entered judgment against the discharged employees who appealed. The Court of Appeals held that statute giving all persons the same right to equal benefit of laws as is enjoyed by white persons confers no actionable rights upon white persons, and that discharge for misappropriation of company property, a charge not alleged to be false, while not dismissing similarly charged black employee did not provide a claim upon which relief could be granted under the equal employment opportunity provisions.

Affirmed.

* * *

James Bullock, Houston, Tex., for plaintiffs-appellants.

Benjamin R. Powel, Robert W. Alexander, Galveston, Tex., for Santa Fe Trail Transp.

James P. Wolf, Houston, Tex., for Local 988.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

[1] 42 U.S.C.A. § 1981 gives all persons within the jurisdiction of the United States the same right to equal benefit of the laws "as is enjoyed by white citizens." The district court held that this section confers no actionable rights upon white persons, and dismissed for lack of jurisdiction the § 1981 claim brought by the two white plaintiffs. We affirm. Perkins v. Banster, 190 F.Supp. 98 (D.Md.), aff'd, 285 F.2d 426 (4th Cir. 1960); Kurylas v. U. S. Department of Agriculture, 373 F.Supp. 1072 (D.D.C. 1974); Van Hoomissen v. Xerox Corp., 368 F.Supp. 829 (N.D.Cal.1973); Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205 (N.D.Ala.1973); *Contra,* WRMA Broadcasting Co. v. Hawthorne, 365 F.Supp. 577 (M.D. Ala.1973); Gannon v. Action, 303 F.Supp. 1240 (E.D. Mo.1969), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D.Mo.1969).

[2] We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C.A. § 2000e et seq. There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not

involved in this case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Cf.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939); Nix v. NLRB, 418 F.2d 1001, 1006 (5th Cir. 1969); AHI Machine Tool & Die, Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970).

Affirmed.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION
NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD, Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988, Defendants.

James Bullock, Houston, Texas, for plaintiffs.

Robert W. Alexander, McLeod, Alexander, Powel & Apffel, Galveston, Texas, for defendants The Santa Fe Trail Transportation Co.

James P. Wolf, Dixie, Wolf & Hall, Houston, Texas, for defendant International Brotherhood of Teamsters Local No. 988.

MODIFIED MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of Caucasians to bring suit under 42 U.S.C. § 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal.

1973); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23 (c)(1).

With regard to plaintiff Laird's allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiff, that charges filed before the EEOC pertained only to the employer, defendants Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where there is a "critical involvement of the collective bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of

a union under Fed. R. Civ. P. 20(a) is proper solely for limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____F. Supp.____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critical involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and that charges were filed with the EEOC by plaintiff McDonald against defendant Santa Fe Trail Transportation Company and Local 988, on or about April 26, 1971, allegedly on behalf of both plaintiffs. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local No. 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they were notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that the nature

of notice given upon termination of grievance proceedings would govern this Court's jurisdiction; that is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claim that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq*. However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of authority, the Court concludes for present purposes that

jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

ENTERED at Houston, Texas, this 13th day of June, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall,
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of caucasians to bring suit under 42 U.S.C.

§ 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point, most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23(c)(1).

With regard to plaintiffs' allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiffs, that charges filed before the EEOC pertained only to the employer, defendant Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where

there is a "critical involvement of the collective bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of a union under Fed. R. Civ. P. 20(a) is proper solely for limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____ F. Supp. ____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critical involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and the charges were filed with the EEOC by plaintiff McDonald, allegedly on behalf of both plaintiffs, on April 26, 1971. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they were notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that

the nature of notice given upon termination of grievance proceedings would govern this Court's jurisdiction; this is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claims that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursuing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. *See, e.g., Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of

authority, the Court concludes for present purposes that jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonald Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

DONE at Houston, Texas, this 2nd day of May, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND ORDER

The plaintiffs, both Caucasian, allege that they and a Negro were charged jointly and severally with misappropriating company property for which the plaintiffs were

discharged but the Negro employee was not. It is alleged that the discharges were for racially discriminatory reasons. Defendant Santa Fe Trail Transportation Company (Santa Fe), the employer, and defendant Teamsters Local Union No. 988, of which only plaintiff McDonald is a member, have raised a variety of apparently valid defenses to federal jurisdiction based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. However, jurisdiction based upon the Civil Rights Act of 1866, 42 U.S.C. § 1981, if proper, would bypass those defenses.

Defendant Santa Fe cites only *Barbour v. Railway Express Agency*, ____ F. Supp. ____ (Civil Action No. 72-235, N.D. Ala., filed Nov. 16, 1973) for the proposition that white persons may not bring an action under § 1981. The plaintiffs oppose the motion to dismiss without citing authority. Without conducting a thorough search, this Court has noted several cases in which jurisdiction was held to be proper. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969) [§ 1982]; *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified on appeal*, 450 F.2d 1227 (8th Cir. 1971); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969). The U.S. Supreme Court has held that white persons have standing to sue under § 810(d) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(d), although expressly reserving the question of standing under § 1982, also a provision of the Civil Rights Act of 1866. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 34 L.Ed.2d 415, 419 § n. 8, 93 S.Ct. 364 (1972). Because this point has received inadequate briefing by the parties, the motions to dismiss for lack of jurisdiction will be denied at this time. They may be reurged during or

following a trial on the merits, thus allowing additional time for suitable briefing.

This Court is also concerned with whether the complaint states a claim upon which relief can be granted. Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed. 2d 688, 93 S.Ct. 1817 (1973). Assuming, arguendo, that the plaintiffs were discharged because they were white while an equally guilty Negro employee was retained because of his race, this Court still questions whether the plaintiffs have stated a claim. (This Court assumes for present purposes that the Negro employee had a similar work record and similar degree of culpability in the offense.) This point has received inadequate attention in the pleadings filed by the parties and has not been briefed.

For the above reasons, the motions to dismiss must be denied at this time. This case will proceed to trial before the Honorable Peter T. Fay upon the assumption that jurisdiction lies; if the facts indicate no cause of action should lie, the case may be dismissed and the issue of jurisdiction will become moot. If the facts suggest that relief is warranted. then the Court may determine whether it has jurisdiction to award such relief.

DONE at Houston, Texas, this 4th day of January, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION COMPANY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988
Defendants

ANSWERS OF THE SANTA FE TRAIL TRANSPORTATION COMPANY TO PLAINTIFFS' INTERROGATORIES

D. H. STRATTON, Houston Terminal Manager of The Santa Fe Trail Transportation Company, having been duly sworn, makes the following Answers to Interrogatories propounded to The Santa Fe Trail Transportation Company by L. N. McDonald and Raymond Laird, plaintiffs in the above entitled cause, such Answers to Interrogatories bearing the same number as Plaintiffs' Interrogatories.

I.(a) L. N. McDonald was discharged because of his dishonesty in the theft of company freight off of company equipment on company property and for violation of company rules.

(b) Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules.

II. This defendant objects to the form of the question, in that it is no question at all, but appears to be a demand for production of a document, which is neither authorized nor required by Rule 33; however, disciplinary action is that outlined in Article 46, Section I of Defendant's Contract with the International Brotherhood of Teamsters.

III. Copies of said Contract are delivered to each of defendant's employees by the Union.

IV.(a) L. N. McDonald and Raymond Lee Laird were the only employees employed at defendant's Houston Terminal by this defendant, who were discharged between January 1 and December 31, 1970.

(b) Date of their discharges was October 2, 1970.

(c) L. N. McDonald was initially employed on June 27, 1962, and Raymond Lee Laird was initially employed on July 27, 1961.

(d) McDonald's position, prior to discharge, was that of driver, and Laird's position or positions, prior to discharge, were that of driver, General Dock Foreman and Transportation Supervisor.

(e) McDonald, according to this defendant's latest information, resides at 301 Bryan Street, Houston, Texas, with Telephone Number 923-5453; Laird, according to this defendant's information, resides at 702 Janisch, Houston, Texas, with Telephone Number 697-7810.

(f) Same Answer as the Answer to Interrogatory No. I.

(g) White.

(h) McDonald, at time of termination, was employed at a wage scale of $4.45 per hour; Laird was employed, at the time of termination, at the rate of $800.00 per month.

(i) Laird was replaced by Roger C. Lowery, at a starting salary of $895.00 per month; however, Mr. Lowery terminated his employment on August 18, 1971. No particular replacement was hired to fill the vacancy created by McDonald's termination.

(j) This defendant objects to the form of questions, in that they are

(k) not questions at all, but appear to be a demand for production of

(l) documents, which is neither authorized nor required by Rule 33

(m) (This Answer applies to (j), (k), (l) and (m).

V. This defendant objects to the form of questions, in that they are

VI. not questions at all, but appear to be a demand for production of

VII. documents, which is neither authorized nor required by Rule 33.

VIII. This Answer applies to V, VI, VII, VIII and IX).

X.

X. No particular officer of the company initiated charges of misappropriating company property against the plaintiffs, L. N. McDonald and Raymond Laird, since the facts surrounding the events leading up to their termi-

nation were the result of a rather general investigation. D. H. Stratton, Terminal Manager at Houston, however, terminated their employ.

XI. Charles Jackson was not charged with mis-appropriating company property.

XII. Plaintiffs were discharged for reasons other than race. The reasons are outlined in Answer to Interrogatory No. 1, and the company has written Statements of the plaintiffs in support thereof.

/s/ D. H. STRATTON
D. H. Stratton

SWORN TO AND SUBSCRIBED BEFORE ME by the said D. H. STRATTON, Terminal Manager for The Santa Fe Trail Transportation Company, this 7th day of April, 1972, to certify which witness my hand and seal of office.

/s/ ETHEL M. MAIS
Notary Public in and for
Galveston County, Texas

McLEOD, ALEXANDER,
POWEL & APFFEL

By /s/ BENJAMIN R. POWEL
Benjamin R. Powel
808 Sealy & Smith Professional
Building
P. O. Box 629
Galveston, Texas 77550
Attorneys for Defendant, The
Santa Fe Trail Transportation
Company

CERTIFICATE OF SERVICE

I, BENJAMIN R. POWEL, hereby certify that service of the foregoing Answers to Interrogatories was made upon James Bullock, 4719 Dowling Street, Houston, Texas 77004; Isaac E. Henderson, P. O. Box 14061, Houston, Texas 77021, Attorneys for Plaintiff; and Dixie, Wolf & Hall, Suite 401, 609 Fannin Street Building, Houston, Texas 77002, Attorneys for Defendant, International Brotherhood of Teamsters Local No. 988, on this 7th day of April, 1972, by placing the same in the United States Mail, postage prepaid, Certified, Return Receipt Requested.

/s/ BENJAMIN R. POWEL
Benjamin R. Powel

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION COMPANY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988,
Defendants

ORIGINAL ANSWER

COMES NOW Teamsters Freight and Tank Line Employees, Local Union No. 988, and files this Original Answer in response to the Complaint of L. N. McDonald and Raymond Laird, Plaintiffs herein, showing the Court as follows:

I.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted as a class action because Plaintiffs will not fairly insure the adequate representation of the described said class, the rights sought to be enforced by this Complaint are not typical of the claims of the said class and the many questions of law and/or fact asserted in the Complaint as affecting the several rights of employees in the described class are not common.

II.

SECOND DEFENSE

Except for conclusionary allegations claiming discriminatory policies, practices, customs and usages which discriminate against members in the described class, the Complaint renders down to an allegation that the two Plaintiffs were discharged on or about October 2, 1970 by Defendant Company on charges that Plaintiffs had misappropriated Company property. The Complaint concludes that Plaintiffs were discriminated against because they were white and discharged whereas a Negro employee was also charged with misappropriation of Company property was not discharged.

The Complaint identifies Plaintiff, Raymond L. Laird, as a dock foreman at the Company's Houston terminal. As such, Plaintiff Laird differs from Plaintiff L. N. McDonald in that Foreman Laird is not within the contractually established bargaining unit. Defendant Union is prohibited from requiring the Company to recognize it as representing foremen or supervisory personnel by the Labor Management Relations Act. 29 U.S.C. 157, et seq. This factor not only shows that a class action does not exist here but explains why a grievance concerning the discharge of Plaintiff McDonald was processed but one for Laird was not. A copy of this grievance marked Exhibit A1 and A2 is attached to this answer. Plaintiff McDonald's grievance complaining that his discharge was forbidden by the contract because it was not for just cause was taken to final and binding arbitration by the Union in acordance with the contract. The award denying Plaintiff's grievance was final and binding on all parties.

The collective bargaining contract in effect between Defendant Union and Defendant Employer protects em-

ployees against discharge or suspension except for just cause and also contains a clause against non-discrimination. It reads as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex or national origin."

Plaintiff L. N. McDonald elected to pursue his contractual remedies for his discharge and any alleged discrimination on or about October 8, 1970. The main issue of whether Plaintiff was discriminated against unjustly by discharge has been judicially and finally decided by an arbitration tribunal of competent and proper jurisdiction in accordance with the collective bargaining contract. After full hearing his grievance was denied on or about October 21, 1970. The Court lacks jurisdiction over the Plaintiff's claim for his discharge because he elected to have it determined through use of the grievance procedure in the collective bargaining agreement and is now estopped from asserting the same claim in a new form in this action.

III.

THIRD DEFENSE

Plaintiff failed to utilize or exhaust his internal Union remedies or his remedies under the Labor Management Relations Act before bringing this action.

Without waiver of the foregoing special defenses and subject thereto, Defendants respond to Plaintiffs' pleadings as follows:

1. Defendant admits the alleged cause of action arises under Title VII of the Civil Rights Act of 1964 as alleged in paragraph I of the complaint.

Defendant denies that this is a proper procedure for a declaratory judgment.

2. Defendant denies that this is a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs allege that the class to be composed of white persons who are employed or might be employed at Defendant Company and who are members or who might become members of Local 938. As a matter of fact, one Plaintiff is a member of supervision and the other Plaintiff is a rank and file employee member of the appropriate bargaining unit. Congress has eliminated supervisory employees from the definition of employee in the Labor Management Relations Act. In the same Act unions are prohibited from requiring the employer to recognize them as representing supervisory employees or to bargain concerning their conditions of work, hire or tenure. Defendants deny that there are common questions of law and fact affecting the rights of the members of this class. Defendant further denies that it has caused members of the described class or any class to be limited or classified, and discriminated against in ways which deprived and intend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race.

3. Defendant denies that it has maintained a policy, practice, custom or usage of discriminating against white

persons because of race with respect to compensation, terms, conditions and privileges of employment or that they have limited, segregated and classified employees of Defendant by race or in ways which deprive white persons of equal employment opportunities and adversely affect their status as employees.

4. Defendant Local Union No. 988 denies the allegations of paragraph IV of the Complaint. Defendant denies that it has instituted or maintained any policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964. The alleged policies, practices, and so on described in paragraph IV of the Complaint all relate to actions of Defendant Employer and not of Defendant Union.

5. The allegations of paragraph V of the Complaint are admitted.

6. Defendant is without knowledge as to the exact operations of Defendant Santa Fe Trail Transportation Company. Defendant Union admits the allegations of paragraph VI-B.

7. Defendant Union admits that it has been the recognized bargaining agent of the appropriate unit for bargaining described in its collective bargaining contract. It admits that Plaintiff L. N. McDonald was a member of the bargaining unit but denies that Plaintiff Raymond Laird was a member of the bargaining unit.

8. Defendant denies that it has violated its duty of fair representation required by the Labor Management Relations Act, but to the contrary, Defendant alleges that it has treated all employees in the bargaining unit on a non-discriminatory basis and that it represented Plaintiff

L. N. McDonald on his grievance fully, fairly and vigorously.

Defendant further denies that it has acquiesced or joined in any unlawful and discriminatory practices complained of in the Complaint or that it has failed to represent properly or to protect the white employees of the bargaining unit of Defendant Company from any discriminatory policies or practices. Defendant denies that it has engaged in a violation of the duty of fair representation or that the Company has knowingly colluded with the Union or participated in such alleged violations of the duty of fair representation.

9. Defendant specially denies that it has instituted, maintained and/or acquiesced in practices, policies, customs and usages which have denied Plaintiffs or other employees equal employment and opportunities because of their race or color, or that it has limited, segregated or classified persons because of their race or color. Defendant has not acquiesced in any policy, practice, custom or usage which would circumvent its collective bargaining contract which strictly requires that all persons in the bargaining unit be treated equally and without discrimination. Defendant denies that it has conspired or acted in collusion with Defendant Employer to deprive these Plaintiffs or any employees of any right. Defendant also denies that it breached its duty of fair representation or acted arbitrarily, capriciously in bad faith or for any invidious motivation towards these Plaintiffs. To the contrary, in regard to Plaintiff L. N. McDonald who filed a grievance, the Union represented him fully, fairly and vigorously in his grievance to a final and binding

award. The final award denying the grievance denied Plaintiff's claim that his discharge was unjust.

WHEREFORE, premises considered, Defendant Union prays that upon the final trial and hearing hereof Plaintiffs take nothing and that Defendant recover all costs of court incurred, and have such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

DIXIE, WOLF & HALL

By: /s/ JAMES P. WOLF
James P. Wolf
Suite 401, 609 Fannin St. Bldg.
Houston, Texas 77002
223-4444
Attorneys for Defendant Union,
Teamsters Local No. 988

CERTIFICATE OF SERVICE

I, James P. Wolf, certify that a copy of the foregoing Defendant Union's Original Answer was served on Mr. James Bullock, 711 Main Building, Houston, Texas 77002, and Mr. Isaac E. Henderson, 2619 Blodgett Street, Houston, Texas 77004, Attorneys for the Plaintiffs, by Certified Mail, Return Receipt Requested, and on The Santa Fe Trail Transportation Co., 6002 Esperson, Houston, Texas 77011, by regular mail, on this the 6th day of December, 1971.

/s/ JAMES P. WOLF
James P. Wolf

TEAMSTER FREIGHT & TANK LINE EMPLOYEES
LOCAL UNION NO. 988
HOUSTON, TEXAS

GRIEVANCE REPORT

Assigned To: Local 988 Date: Oct. 8, 1970

Company: Santa Fe

Employee's Address: 301 Bryan St. Employee's Telephone No.: WA. 3-54.53

Did you contact Steward Yes Steward's Signature [signature]

Explain as fully as possible nature of grievance. If necessary use reverse side:

Date grievance occurred Oct. 2, 1970

Time grievance occurred On or 2nd I, L.M. McDonald was unjustly discharged from Santa Fe Trail Trans. Co. for dishonesty & theft of freight.

These Charges are wrong and are unjust, because I did not steal anything or was not dishonest in any way. I was accused of stealing 10 cases of Anti-freeze off trailer 20435 till said was to be by supervisor that McAdoo at L.M.S. who is the shipping clerk, said (our)

TO THE JOINT SOUTHWEST AREA GRIEVANCE COMMITTEE:

This is to advise you that I hereby give authority to any Union Representative of Local Union No. 988 to represent me and ratify and confirm any and all things such Union representative may do in my behalf on this matter in the event that I do not make myself present at the Grievance Committee hearing for the above mentioned grievance.

Employee Signature L.M. McDonald

Steward's Report I did not take this down in writing but I was told by the Employee, and that the Charges are true

Give full details as to disposition:

DATE COMPLETED 10/15/70 Business Agent

there were some Antifreeze over on trailer 20438 and we could do what we wanted to do with it, and Mr. Laird told me what to do with this antifreeze.

APPENDIX G

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and
RAYMOND LAIRD, *Plaintiffs*

v.

THE SANTE FE TRAIL TRANSPORTATION CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988, *Defendants*

PLAINTIFF'S SECOND AMENDED COMPLAINT

I.

Comes now the Plaintiff, and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1343 (4); 42 U.S.C., sec. 2000 e-S (f) and 28 U.S.C. secs. 2201 and 2202. This is a suit in equity, authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000 e et seq., providing for injunctive and other relief

against racial discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. secs. 151 et seq., based on violations of fair representation owed to plaintiffs and the class they represent.

II.

Plaintiffs brings this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The class which plaintiffs represents is composed of white persons who are employed or might be employed by the SANTA FE TRAIL TRANSPORTATION CO. at its Transportation Terminal located in Houston, Texas and who are members or might become members of the Local 988, who have been and continue to be or might be adversely affected by the practices complained herein. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race conditions of employment. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. Defendants have acted or refused to act on grounds generally applicable to the class.

III.

This is a proceeding for a declaratory judgment as to plaintiffs rights and for a preliminary and permanent in-

junction, restraining defendants from maintaining a policy, practice, custom or usage of (a) discriminating against plaintiffs and other white persons in this class because of race with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, SANTA FE TRAIL TRANSPORTATION CO. who are members of Local 988 in ways which deprive plaintiffs and other white persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race.

IV.

The plaintiff, L. N. McDonald is a white citizen of the United States and a resident of the City of Houston in the State of Texas. Plaintiff, L. N. McDonald has been employed by Defendant as a truck driver at its transportation terminal in Houston, Texas and is a member in good standing of Local 988 of the International Brotherhood of Teamsters.

The Plaintiff, Raymond L. Laird is a white citizen of the United States and is a resident of the City of Houston and the State of Texas. Plaintiff, Raymond L. Laird has been employed by Defendant as a dock foreman at its transportation terminal in Houston, Texas for about nine and one-half years and is a member in good standing of Local 988.

V.

(A) Defendant, Santa Fe Trail Transportation Co. is a common carrier doing business in the State of Texas and the City of Houston. The Company operates and

maintains Ground Transportation and is an employer within the meaning of 42 U.S.C. sec. 2000e (b) in that the company is engaged in an industry affecting commerce and employ at least twenty-five persons.

(B) Defendant, International Brotherhood of Teamsters Local 988, is a labor organization within the meaning of 42 U.S.C. secs. 2000e (d) and (c) in that International Brotherhood of Teamsters Local No. 988 is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievance, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Company at its plants and other facilities in and around the City of Houston in the State of Texas. The International Brotherhood of Teamsters Local 988 has at least twenty-five members.

VI.

The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory have been instituted and/or maintained by the defendants, as well as violations of the duty of fair representation owed to plaintiffs under 29 U.S.C. secs. 151 et seq.

(A) On or about October 2, 1970, the plaintiffs, L. N. McDonald and Raymond Laird were discharged from employment by Defendant, Santa Fe Trail Transportation Company without cause and on information and belief, Plaintiffs alleges that they were discharged of their race, Caucasian.

(B) On or about September 26, 1970, Plaintiffs, along with one negro employee, Charles Jackson were all charged jointly and severally charged with mis-appropriating company property, to-wit; ten cases of six one gallon cans of anti-freeze, all of which were part of a shipment of twenty-five cases being shipped to Defendants' customers.

(C) On October 2, 1970, Defendant discharged Plaintiffs, L. N. McDonald and Raymond L. Laird while retaining the negro employee, Charles Jackson in its employ, Plaintiffs allege that Defendant imposed a more severe disciplinary sanction against them because of their race, Caucasian than against their negro counterpart.

(D) On or about October 2, 1970, Plaintiffs filed a grievance with the Local Union 988 pursuant to the Article 44 of its collective bargaining agreement in accordance with the Procedure outlined for settling such disputes.

(E) On or about April 3, 1971, Plaintiffs were notified in writing by Local Union 988 that it would not pursue the claim or grievance any further and would not seek arbitration.

(F) On or about April 7, 1971, Plaintiffs filed a complaint with the E.E.O.C. which was approximately six months and three days from the day the grievance was first filed with the Union. Plaintiffs allege that the delay in filing with the E.E.O.C. was consumed in grievance procedures under an existing collective bargaining agreement and that the 90-day statute was tolled during such period.

VII.

On April 7, 1971, Plaintiffs filed a timely and proper complaint before the Equal Employment Opportunity Commission (E.E.O.C.) alleging denial by Defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq. On July 15, 1971, the Commission notified plaintiffs under the provisions of Section 706 (e) of Title VII of the Civil Rights Act of 1964, the plaintiffs had the right to bring a civil action in a United States District Court.

Neither the State of Texas nor the City of Houston has a law prohibiting the unlawful employment practices alleged herein.

VIII.

Plaintiffs do hereby incorporate and adopt by reference all of the allegations set forth in Paragraph I through VII of this complaint.

IX.

At all times material herein Local 988 and the International Brotherhood of Teamsters have been certified recognized representatives under the National Labor Relations Act of the plaintiffs and the class they represent.

X.

Defendants, International Brotherhood of Teamsters and Local 988 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices

complained of in Paragraph VI and they have failed to protect the White members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XI.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiffs and the class they represents a permanent injunction enjoining the defendant Santa Fe Trail Transportation Co. its agents, successors, employees, attorneys and those acting in concert with it at its direction from continuing to maintain discriminatory disciplinary policies that imposes more severe disciplinary sanctions against Plaintiffs because of their race, Caucasian than against their negro counter-part, denying Plaintiffs rights to equal treatment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

2. Grant Plaintiffs a preliminary injunction ordering the Defendant, Santa Fe Trail Transportation Co. to re-

instate L. N. McDonald and Raymond L. Laird with all back pay wages lost, monetary losses and seniority lost as a result of the discriminatory discharge.

3. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant, International Brotherhood of Teamsters Local 988, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiffs to be impartially and fairly represented on the basis of merit rather that race, and the right to equal representation as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000e et seq.

4. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant International Brotherhood of Teamsters Local 988 its agents, successors, employees, and those acting in concert with it from refusing to properly and diligently represent plaintiffs and the class they represent.

5. Order the Defendants to take that affirmative action necessary to correct the practices, policies, customs and usages which discriminates against Plaintiffs and members of the class plaintiffs represents because of their race, Caucasian.

6. Plaintiffs further pray that this Court will allow them cost herein, reasonable attorney's fees and grant such

further additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

JAMES BULLOCK
James Bullock
Attorney at Law
4719 Dowling Street
Houston, Texas 77004
713-529-4701

CERTIFICATE OF SERVICE

I, James Bullock, certify that a copy of the Plaintiff's Second Amended Complaint was served upon the following by certified mail: Attorney Robert W. Alexander, Post Office Box 629, Galveston, Texas 77550 on this 17th day of July, 1973. Attorney for the Defendant, Santa Fe Trail Transportation Company. And Mr. James P. Wolf, Esquire, Dixie, Wolf & Hall. 609 Fannin St. Houston, Texas 77002.

/s/ JAMES BULLOCK
James Bullock

Supreme Court, U. S.
FILED
DEC 24 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners,

—v.—

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition For Certiorari Filed August 18, 1975
Certiorari Granted November 3, 1975

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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CLERK'S DOCKET ENTRIES

CLOSED 5-2-74
JS 6 made pt

71-H-891

CIVIL DOCKET

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
C. Form No. 106A Rev. Houston Division

Jury demand date:

CASE O. BUE, JR

TITLE OF CASE	ATTORNEYS
L. N. McDONALD & RAYMOND LAIRD VS THE SANTA FE TRAIL TRANSPORTATION CO. AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988	For plaintiff: ~~ISAAC E. HENDERSON~~ ~~711 Main Building~~ ~~Houston, Texas 77002~~ ~~2619 Blodgett~~ ~~521-9556~~ James Bullock 4719 Dowling Houston, Texas 77004 529-4701 For defendant: Sante Fe Trail Trans.- McLeod,Alexander,Powel & Apffel (Robert W. Alexander) P.O.Box 629 Galveston, Texas 77550 International Union No. 988- James P. Wolf DIXIE, WOLF & HALL 609 Fannin St. Bldg., #401 Houston, Texas 77002 223-4444

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 6 mailed	Clerk		3/16/71	I E H	15 00	
			3/20/71	Cash		15 00
. 6 mailed	Marshal		5/24/74	J. Bullock Not. of Appeal	$5.00	
			5-3-74	C.O. 1-35		5 00
is of Action: Civil Rights, Junctive Relief, Preliminary Permanent Injunction	Docket fee					
	Witness fees					
tion arose at:	Depositions					

CA-H-891

CIVIL D. 1

DATE	PROCEEDINGS	Date Or Judgment
9/16/71	Original Complaint filed in Duplicate	1.
9/16/71	Summons issued on Santa Fe Transportation Company	
9/15/71	Summons on Santa Fe Ret. & filed. Ex. 9/9/71	2.
9-30-71	Defendant the Santa Fe Trail Transportation Company's motion to dismiss filed in duplicate (M /D 10-11-71)	3 11
9-30-71	Defendant the Santa Fe Trail Transportation Company's brief in support of its motion to dismiss filed in duplicate	4 14
10/18/71	Plaintiff's Reply to Defendant's Motion to Dismiss, filed.	5.15
11/15/71	Summons issued on International Brotherhood of Teamsters Local, No. 988	
12/6/71	Summons returned, executed on 11-17-71 on International Brotherhood of Teamsters Local No. 988, filed.	6.
12-7-71	ANSWER of Local Union No. 988, filed.	7 7
3/7/72	Plaintiff's Motion for Leave to File Amended Complaint, filed.	8.2
3/7/72	Plaintiffs' First Amended Complaint filed in Duplicate.	9.3
4/11/72	Answers of the Santa Fe Trail Transportation Co. to Plaintiffs' Interrogatories, filed.	10.3
4/24/72	Plaintiff's Interrogatories to Deft. Santa Fe Trail Transportation Co., filed.	11.4
6-10-73	Motion (Issac E. Henderson) to withdraw filed	12 4
7-11-73	(COB) PRE-TRIAL held.	
7-11-73	(COB) "The motion of Issac E. Henderson to withdraw as one of the counsel of record representing plaintiffs is GRANTED. . ."	4-A
7/19/73	Plaintiff's Second AMENDED COMPLAINT, filed.	13.4
7/25/73	Deft. Teamsters Local Union No. 988's Combined Notice of and MOTION to Dismiss, M/D 8/13/73.	14.5
7/25/73	Deft. Teamsters Local Union No. 988's BRIEF in Support of its Motion to Dismiss, filed.	15.6
7/25/73	Deft. Local Union No. 988's FIRST AMENDED ANSWER, filed.	16.4
1-28-73	ORIGINAL ANSWER of Deft. The Santa Fe Trail Transportation Co., filed.	17 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s MOTION TO DISMISS, filed. M/D: 12-24-73 by Clerk	18 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s BRIEF in Support of Its Motion to Dismiss, filed.	1981
2- 2-73	Amended Certificate of Service to Deft.'s The Santa Fe Trail Transportation Co.'s Motion to Dismiss, Brief in Support of Its Motion to Dismiss and Original Answer, filed.	20 8
2- 7-73	(COB) MEMORANDUM & ORDER, signed & filed. Pltf. directed to submit opposition to deft. Teamsters' Motion to Dismiss as well as Deft. Santa Fe's Motion to Dismiss no later than 12-24-73, or case will be dismissed for want of prosecution. (parties ntfd by c/c,rlo)	21
2-12-73	Deft. Santa Fe Trail Transportation Co.'s Supplemental BRIEF in Support of Its Motion to Dismiss, filed.	22
2-26-73	Pltf.'s Motion and MEMORANDUM in Opposition to Deft.'s Santa Fe Trail Transportation Co.'s Motion to Dismiss and Brief in Support, filed.	184 23

CA 71-H-891 Carl O. Bue, Jr.

Page #3

D. C. 1106 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judge
1- 4-74	(COB) MEMORANDUM AND ORDER, signed & filed, Defts. Teamsters Local Union No. 988 and Santa Fe Trail Transportation Co.'s MOTIONS to Dismiss DENIED. Parties ntfd. by c/c. pt	10 24
1- 4-74	Deft. Santa Fe Trail Trans. MOTION FOR CONTINUANCE, filed.	25
1- 7-74	(COB) ORDER granting Motion of Santa Fe Trail Trsp. Co. for Continuance and re-setting case for trial at 10:00 am. May 3, 1974, signed & filed. (parties notified by c/c,rlo	26 111
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND MOTION TO DISMISS, filed. M/D: 4-29-74	27 114
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND SUPPLEMENTAL BRIEF in Support of Its Motion to Dismiss, filed.	28 117
5- 2-74	(COB) MEMORANDUM AND OPINION, signed & filed. Deft. Santa Fe Trail Transportation Co.'s Motion to Dismiss for lack of jurisdiction GRANTED; Court concludes action may not be maintained as a class action; action dismissed as to Deft. International Brotherhood of Teamsters Local No. 988 for want of jurisdiction; Court dismissed action w/prej. Parties ntfd. pt	29 12
5- 2-74	(COB) FINAL JUDGMENT, signed & filed, cause dismissed w/prej. Parties ntfd. by copy. pt	30 124
5- 9-74	DEPOSITIONS of the following, filed:	31
	Charles Adrian Jackson	32
	L. N. McDonald	33
	Donald Howard Stratton	34
	Fred Osburn, Jr.	35
	Raymond Laird	
5-22-74	Deft. Motion to Correct and Clarify Memorandum and Opinion accompanying Final Judgment herein of 5-2-74, filed.	36 12
5-24-74	Plffs' Notice of Appeal, filed.	37 127
6-13-74	(COB) MODIFIED MEMORANDUM & OPINION, filed. No proper basis for Title VII relief found and action against Deft. IBT # 988 dismissed for want of jurisdiction; further consideration as to deft. Santa Fe Trail Trsp. Co.-no claim upon which Title VII relief can be granted. This case dismissed with prejudice. Parties notified by copy.	38 133
6-13-74	(COB) FINAL JUDGMENT, filed. Case dismissed w/prejudice in line with its Memorandum & Opinion of even date. Parties notified by copy. rlo	39 134

IN THE

United States District Court

For The Southern District of Texas
Houston Division

CIVIL ACTION NO. _____

L. N. McDONALD and RAYMOND LAIRD
Plaintiffs

vs.

THE SANTA FE TRAIL TRANSPORTATION CO.
and
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988
Defendants

COMPLAINT

Count 1

I.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1343(4); 42 U.S.C. sec. 2000e-5 (f) and 28 U.S.C. secs. 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction

of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. secs. 151 et seq., based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

II.

Plaintiffs brings this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represents is composed of white persons who are employed or might be employed by the persons who are employed or might be employed by the SANTA FE TRAIL TRANSPORTATION CO. at its Transportation Terminal located in Houston, Texas and who are members or might become members of the Local 988, who have been and continue to be or might be adversely affected by the practices complained herein. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

III.

This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy,

practice, custom or useage of (a) discriminating against plaintiffs and other white persons in this class because of race with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, SANTA FE TRAIL TRANSPORTATION CO. who are members of Local 988 in ways which deprive plaintiffs and other white persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race.

IV.

The following policies, practices, customs and useages made unlawful by Title VII of the Civil Rights Act of 1964 have been instituted and/or maintained by the defendants.

(A) On or about October 2, 1970, the Plaintiffs, L. N. McDonald and Raymond Laird were discharged from employment by Defendant without cause and on information and belief. Plaintiffs alleges that they were discharged because of their race, caucasian.

(B) On or about September 26, 1970, Plaintiffs, L. N. McDonald and Raymond L. Laird along with one Negro employee, Charles Jackson were all charged jointly and severally with mis-appropriating company property, ten cases of six one gallon cans of anti-freeze, all of which were part of a shipment to twenty-five cases being shipped to Defendant's customers.

(C) On October 2, 1970 Defendant discharged Plaintiffs, L. N. McDonald and Raymond L. Laird while retaining the Negro employee, Charles Jackson in its employ, Plaintiffs alleges that Defendant imposed a more

severe disciplinary sanction against them because of their race, Caucasian than against their Negro counter part for his involvement.

V.

The plaintiff, L. N. McDonald is a white citizen of the United States and a resident of the City of Houston in the State of Texas. Plaintiff, L. N. McDonald has been employed by Defendant as a truck driver at its tranportation termial in Houston, Texas and is a member in good standing of Local 988 of the International Brotherhood of Teamsters.

The Plaintiff, Raymond L. Laird is a white citizen of the United States and is a resident of the city of Houston and the State of Texas. Plaintiff, Raymond L. Laird has been employed by Defendant as a dock foreman at its transportation terminal in Houston, Texas for about nine and one-half years and is a member in good standing of Local 988.

VI.

(A) Defendant, Santa Fe Trail Transportation Co. is a common carrier doing business in the State of Texas and the City of Houston. The Company operates and maintains Ground Transportation and is an employer within the meaning of 42 U.S.C. sec. 2000e-(b) in that the company is engaged in an industry affecting commerce and employ at least twenty-five persons.

(B) Defendant, International Brotherhood of Teamsters Local 988, is a labor organization within the meaning of 42 U.S.C. secs. 200-e (d) and (c) in that International Brotherhood of Teamsters Local No. 988 is en-

gaged in a industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievance, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Company at its plants and other facilities located in various cities and states throughout the United States, including employees of the Company's plants and other facilities in and around the City of Houston in the State of Texas. The International Brotherhood of Teamsters Local 988 has at least twenty-five members.

VII.

On April 7, 1971, Plaintiffs filed a timely and proper complaint before the Equal Employment Opportunity Commission (E.E.O.C.) alleging denial by Defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq. On July 15, 1971, the Commission notified plaintiffs under the provisions of Section 706(e) of Title VII of the Civil Rights Act of 1964, the plaintiffs had the right to bring a civil action in a United States District Court.

Neither the State of Texas nor the City of Houston has a law prohibiting the unlawful employment practices alleged herein.

Count II

VIII.

Plaintiffs does hereby incorporate and adopt by reference all of the allegations set fort in Paragraph I through VIII of Count I of this Complaint.

IX.

At all times material herein Local 988 and the International Brotherhood of Teamsters have been certified recognized representatives under the National Labor Relations Act of the plaintiffs and the class they represents.

X.

Defendants, International Brotherhood of Teamsters and Local 988 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices complained of in Paragraph IV and they have failed to protect the White members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XI.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represents are now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiffs and the class they represents a permanent injunction enjoining the defendant Santa Fe Trail Transportation Co. its agents, successors, employees, attorneys and those acting in concert with it at its direction from continuing to maintain discriminatory disciplinary policies that imposes more severe disciplinary sanctions against Plaintiffs because of their race, Caucasian than against their Negro counter-part, denying Plaintiffs rights to equal treatment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

2. Grant Plaintiffs a preliminary injunction ordering the Defendant, Santa Fe Trail Transportation Co. to reinstate L. N. McDonald and Raymond L. Laird with all back pay wages lost, monetary losses and seniority lost as a result of the discriminatory discharge.

3. Grant Plaintiffs and the class they represents a permanent injunction enjoining the defendant, International Brotherhood of Teamsters Local 988, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiffs to be impartially and fairly represented on the basis of merit rather than race, and the right to equal representation as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

4. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant International Brotherhood of Teamster Local 988 its agents, successors, employees, and those acting in concert with it from refusing to properly and diligently represent plaintiffs and the class they represent.

5. Order the Defendants to take that affirmative action necessary to correct the practices, policies, customs and useages which discriminates against Plaintiffs and members of the class plaintiffs represents because of their race, Caucasian.

6. Plaintiffs further prays that this Court will allow them cost herein, reasonable attorney's fees and grant such further additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

JAMES BULLOCK
Attorney at Law
711 Main Building
Houston, Texas 77002
713-228-2241

Isaac E. Henderson
2619 Blodgett Street
Houston, Texas 77004
713-521-9556

Attorneys For Plaintiffs

(Jurat Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

ORIGINAL ANSWER

COMES NOW Teamsters Freight and Tank Line Employees, Local Union No. 988, and files this Original Answer in response to the Complaint of L. N. McDonald and Raymond Laird, Plaintiffs herein, showing the Court as follows:

I.
FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted as a class action because Plaintiffs will not fairly insure the adequate representation of the described said class, the rights sought to be enforced by this Complaint are not typical of the claims of the said class and the many questions of law and/or fact asserted in the Complaint as affecting the several rights of employees in the described class are not common.

II.
SECOND DEFENSE

Except for conclusionary allegations claiming discriminatory policies, practices, customs and usages which discriminate against members in the described class, the Complaint renders down to an allegation that the two Plaintiffs were discharged on or about October 2, 1970

by Defendant Company on charges that Plaintiffs had misappropriated Company property. The Complaint concludes that Plaineiffs were discriminated against because they were white and discharged whereas a Negro employee was also charged with misappropriation of Company property was not discharged.

The Complaint identifies Plaintiff, Raymond L. Laird, as a dock foreman at the Company's Houston terminal. As such, Plaintiff Laird differs from Plaintiff L. N. McDonald in that Foreman Laird is not within the contractually established bargaining unit. Defendant Union is prohibited from requiring the Company to recognize it as representing foremen or supervisory personnel by the Labor Management Relations Act. 29 U.S.C. 157, et seq. This factor not only shows that a class action does not exist here but explains why a grievance concerning the discharge of Plaintiff McDonald was processed but one for Laird was not. A copy of this grievance marked Exhibit A1 and A2 is attached to this answer. Plaintiff McDonald' grievance complaining that his discharge was forbidden by the contract because it was not for just cause was taken to final and binding arbitration by the Union in accordance with the contract. The award denying Plaintiff's grievance was final and binding on all parties.

The collective bargaining contract in effect between Defendant Union and Defendant Employer protects employees against discharge or suspension except for just cause and also contains a clause against non-discrimination. It reads as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment be-

cause of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex or national origin."

Plaintiff L. N. McDonald elected to pursue his contractual remedies for his discharge and any alleged discrimination on or about October 8, 1970. The main issue of whether Plaintiff was discriminated against unjustly by discharge has been judicially and finally decided by an arbitration tribunal of competent and proper jurisdiction in accordance with the collective bargaining contract. After full hearing his grievance was denied on or about October 21, 1970. The Court lacks jurisdiction over the Plaintiff's claim for his discharge because he elected to have it determined through use of the grievance procedure in the collective bargaining agreement and is now estopped from asserting the same claim in a new form in this action.

III.
THIRD DEFENSE

Plaintiff failed to utilize or exhaust his internal Union remedies or his remedies under the Labor Management Relations Act before bringing this action.

Without waiver of the foregoing special defenses and subject thereto, Defendants respond to Plaintiff's pleadings as follows:

1. Defendant admits the alleged cause of action arises under Title VII of the Civil Rights Act of 1964 as alleged in Paragraph I of the complaint.

Defendant denies that this is a proper procedure for a declaratory judgment.

2. Defendant denies that this is a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs allege that the class to be composed of white persons who are employed or might be employed at Defendant Company and who are members or who might become members of Local 988. As a matter of fact, one Plaintiff is a member of supervision and the other Plaintiff is a rank and file employee member of the appropriate bargaining unit. Congress has eliminated supervisory employees from the definition of employee in the Labor Management Relations Act. In the same Act unions are prohibited from requiring the employer to recognize them as representing supervisory employees or to bargain concerning their conditions of work, hire or tenure. Defendants deny that there are common questions of law and fact affecting the rights of the members of this class. Defendant further denies that it has caused members of the described class or any class to be limited or classified, and discriminated against in ways which deprived and intend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race.

3. Defendant denies that it has maintained a policy, practice, custom or usage of discriminating against white persons because of race with respect to compensation, terms, conditions and privileges of employment or that they have limited, segregated and classified employees of Defendant by race or in ways which deprive white persons of equal employment opportunities and adversely affect their status as employees.

4. Defendant Local Union No. 988 denies the allegations of paragraph IV of the Complaint. Defendant denies that it has instituted or maintained any policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964. The alleged policies, practices, and so on described in paragraph IV of the Complaint all relate to actions of Defendant Employer and not of Defendant Union.

5. The allegations of paragraph V of the Complaint are admitted.

6. Defendant is without knowledge as to the exact operations of Defendant Santa Fe Trail Transportation Company. Defendant Union admits the allegations of paragraph VI-B.

7. Defendant Union admits that it has been the recognized bargaining agent of the appropriate unit for bargaining described in its collective bargaining contract. It admits that Plaintiff L. N. McDonald was a member of the bargaining unit but denies that Plaintiff Raymond Laird was a member of the bargaining unit.

8. Defendant denies that it has violated its duty of fair representation required by the Labor Management Relations Act, but to the contrary, Defendant alleges that it has treated all employees in the bargaining unit on a non-discriminatory basis and that it represented Plaintiff L. N. McDonald on his grievance fully, fairly and vigorously.

Defendant further denies that it has acquiesced or joined in any unlawful and discriminatory practices complained of in the Complaint or that it has failed to represent properly or to protect the white employees of the bargaining unit of Defendant Company from any discriminatory

policies or practices. Defendant denies that it has engaged in a violation of the duty of fair representation or that the Company has knowingly colluded with the Union or participated in such alleged violations of the duty of fair representation.

9. Defendant specially denies that it has instituted, maintained and/or acquiesced in practices, policies, customs and usages which have denied Plaintiffs or other employees equal employment and opportunities because of their race or color, or that it has limited, segregated or classified persons because of their race or color. Defendant has not acquiesced in any policy, practice, custom or usage which would circumvent its collective bargaining contract which strictly requires that all persons in the bargaining unit be treated equally and without discrimination. Defendant denies that it has conspired or acted in collusion with Defendant Employer to deprive these Plaintiffs or any employees of any right. Defendant also denies that it breached its duty of fair representation or acted arbitrarily, capriciously in bad faith or for any invidious motivation towards these Plaintiffs. To the contrary, in regard to Plaintiff L. N. McDonald who filed a grievance, the Union represented him fully, fairly and vigorously in his grievance to a final and binding award. The final award denying the grievance denied Plaintiff's claim that his discharge was unjust.

WHEREFORE, premises considered, Defendant Union prays that upon the final trial and hearing hereof Plaintiffs take nothing and that Defendant recover all costs of court incurred, and have such other and further relief, both

general and special, legal and equitable, to which it may show itself justly entitled.

DIXIE, WOLF & HALL

By: _____

James P. Wolf
Suite 401, 609 Fannin St. Bldg.
Houston, Texas 77002
223-4444
ATTORNEYS FOR
DEFENDANT UNION,
TEAMSTERS LOCAL NO. 988

(Certificate of Service Omitted in Printing)

Exhibit A1

TEAMSTER FREIGHT & TANK LINE EMPLOYEES
LOCAL UNION NO. 988
HOUSTON, TEXAS

GRIEVANCE REPORT

Assigned To: Local 988 Date: Oct. 8, 1970

Company: Lone Star

Employer's Address: 301 Bryan St. Employer's Telephone No.: WA. 3-5453

Did you contact Steward Yes Steward's Signature A(Z

Explain as fully as possible nature of grievance. If necessary use reverse side:

Date grievance occurred Oct. 2, 1970

Time grievance occurred On Oct 2nd I, J. W. McDonald was unjustly discharged from Lone Star Trail Trans. Co. for dishonesty & theft of freight.

These Charges are wrong and are unjust, because I did not steal any thing or I was not dishonest in any way. I was accused of stealing 10 cases of Antifreeze off trailer 20438 & it I said was to buy Lunch with that Mr. Alley at L. M. S. who is the shipping clerk, said (our)

TO THE JOINT SOUTHWEST AREA GRIEVANCE COMMITTEE:

This is to advise you that I hereby give authority to any Union Representative of Local Union No. 988 to represent me and ratify and confirm any and all things such Union representative may do in my behalf on this matter in the event that I do not make myself present at the Grievance Committee hearing for the above mentioned grievance.

Employee Signature J. W. McDonald

Steward's Report I feel that this man is victim unjustly accused, And that the Charges are wrong

Give full details as to disposition: _____

DATE COMPLETED 10/18/70 Business Agent _____

Exhibit A2

this was some Anti Trust crap or
Civil 20438 and we could also
subpoena and prosecute do with
it, and Pls Counsel told me what to
do with this Antitrust.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

PLAINTIFF'S FIRST AMENDED COMPLAINT

I.

Comes now the Plaintiff, and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1343 (4); 42 U.S.C. sec. 2000e-5 (f) and 28 U.S.C. secs. 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. secs. 151 et seq., based on violations of fair representation owed to plaintiffs and the class they represent.

II.

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to

Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The class which plaintiffs represents is composed of white persons who are employed or might be employed by the SANTA FE TRAIL TRANSPORTATION CO. at its Transportation Terminal located in Houston, Texas and who are members or might become members of the Local 988, who have been and continue to be or might be adversely affected by the practices complained herein. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. Defendants have acted or refused to act on grounds generally applicable to the class.

III.

This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of (a) discriminating against plaintiffs and other white persons in this class because of race with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, SANTA FE TRAIL TRANSPORTATION CO. who are members of Local 988 in ways which deprive plaintiffs and other white persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race.

IV.

The plaintiff, L. N. McDonald is a white citizen of the United States and a resident of the City of Houston in the State of Texas. Plaintiff, L. N. McDonald has been employed by Defendant as a truck driver at its transportation terminal in Houston, Texas and is a member in good standing of Local 988 of the International Brotherhood of Teamsters.

The Plaintiff, Raymond L. Laird is a white citizen of the United States and is a resident of the city of Houston and the State of Texas. Plaintiff, Raymond L. Laird has been employed by Defendant as a dock foreman at its transportation terminal in Houston, Texas for about nine and one-half years and is a member in good standing of Local 988.

V.

(A) Defendant, Santa Fe Trail Transportation Co. is a common carrier doing business in the State of Texas and the City of Houston. The Company operates and maintains Ground Transportation is an employer within the meaning of 42 U.S.C. sec. 2000e-(b) in that the company is engaged in an industry affecting commerce and employ at least twenty-five persons.

(B) Defendant, International Brotherhood of Teamsters Local 988, is a labor organization within the meaning of 42 U.S.C. secs. 2000-e (d) and (c) in that International Brotherhood of Teamsters Local No. 988 is engaged in a industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievance, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of

the employees of the Company at its plants and other facilities in and around the City of Houston in the State of Texas. The International Brotherhood of Teamsters Local 988 has at least twenty-five members.

VI.

The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory have been instituted and/or maintained by the defendants, as well as violations of the duty of fair representation owed to plaintiffs under 29 U.S.C. secs. 151 et seq.

(A) On or about October 2, 1970, the plaintiffs, L. N. McDonald and Raymond Laird were discharged from employment by Defendant, Santa Fe Trail Transportation Compan , without cause and on information and belief, Plaintiffs alleges that they were discharged because of their race, caucasian.

(B) On or about September 26, 1970, Plaintiffs, L. N. McDonald and Raymond L. Laird along with one negro employee, Charles Jackson were all charged jointly and severally with mis-appropriating company property, to-wit; ten cases of six one gallon cans of anti-freeze, all of which were part of a shipment of twenty-five cases being shipped to Defendant's customers.

(C) On October 2, 1971, Defendant discharged Plaintiffs, L. N. McDonald and Raymond L. Laird while retaining the negro employee, Charles Jackson in its employ, Plaintiffs alleges that Defendant imposed a more severe disciplinary sanction against them because of their race, Caucasian than against their negro counterpart.

(D) On or about October 2, 1970, Plaintiffs filed a grievance with the Local Union 988 pursuant to the Article 44 of its collective bargaining agreement in accordance with the Procedure outlined for settling such dispute.

(E) On or about April 3, 1971, Plaintiffs were notified in writing by Local Union 988 that it would not pursue the claim or grievance any further and would not seek arbitration.

(F) On or about April 9, 1971, Plaintiffs filed a complaint with the E.E.O.C. which was approximately six months and three days from the day the grievance was first filed with the Union. Plaintiffs alleges that the delay in filing with the E.E.O.C. was consumed in grievance procedures under an existing collective bargaining agreement and that the 90-day statute was tolled during such period.

VII.

On April 7, 1971, Plaintiffs filed a timely and proper complaint before the Equal Employment Opportunity Commission (E.E.O.C.) alleging denial by Defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq. On July 15, 1971, the Commission notified plaintiffs under the provisions of Section 906 (e) of Title VII of the Civil Rights Act of 1964, the plaintiffs had the right to bring a civil action in a United States District Court.

Neither the State of Texas nor the City of Houston has a law prohibiting the unlawful employment practices alleged herein.

VIII.

Plaintiffs does hereby incorporate and adopt by reference all of the allegations set forth in Paragraph I through VII of this Complaint.

IX.

At all times material herein Local 988 and the International Brotherhood of Teamsters have been certified recognized representatives under the National Labor Relations Act of the plaintiffs and the class they represent.

X.

Defendants, International Brotherhood of Teamsters and Local 988 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices complained of in Paragraph VI and they have failed to protect the White members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XI.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant Santa Fe Trail Transportation Co. its agents, successors, employees, attorneys and those acting in concert with it at its direction from continuing to maintain discriminatory disciplinary policies that imposes more severe disciplinary sanctions against Plaintiffs because of their race, Caucasian than against their Negro counter-part, denying Plaintiffs rights to equal treatment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

2. Grant Plaintiffs a preliminary injunction ordering the Defendant, Santa Fe Trail Transportation Co. to reinstate L. N. McDonald and Raymond L. Laird with all back pay wages lost, monetary losses and seniority lost as a result of the discriminatory discharge.

3. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant, International Brotherhood of Teamsters Local 988, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiffs to be impartially and fairly represented on the basis of merit rather than race, and the right to equal representation as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq.

4. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant International Brotherhood of Teamster Local 988 its agents, successors, employees, and those acting in concert with it from refusing to properly and diligently represent plaintiffs and the class they represent.

5. Order the Defendants to take that affirmative action necessary to correct the practices, policies, customs and usages which discriminates against Plaintiffs and members of the class plaintiffs represents because of their race, Caucasian.

6. Plaintiff further prays that this Court will allow them cost herein, reasonable attorney's fees and grant such further additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

JAMES BULLOCK
Attorney at Law
4719 Dowling Street
Houston, Texas 77004
713-529-4701

Isaac E. Henderson
2619 Blodgett Street
Houston, Texas
713-521-9556
ATTORNEYS FOR
PLAINTIFFS

By:_____
JAMES BULLOCK

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted In Printing)

To The Santa Fe Trail Transportation Company
Defendant:

The Plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who know the facts about which inquiry is made and that the answers be served on Plaintiff within fifteen (15) days from the time these interrogatories are served on you:

Interrogatory No. I: The specific reason for which the following individuals (Plaintiffs) were discharged; (a) L. N. McDonald and, (b) Raymond Laird.

Interrogatory No. II: A copy of Company's written policy on disciplinary action.

Interrogatory No. III: What means is utilized to make this policy known to Company employees?

Interrogatory No. IV: A list of all company employees discharged between January 1, 1970 and December 31, 1970, to include:

a. the name of the individual.

b. the date of discharge;

c. the date of the individual's initial employment;

d. the position or positions held by the individual prior to discharge;

e. the address and telephone number of the individual discharged;

f. the specific reason for the discharge;

g. the race or national origin of the individual discharged;

h. what are the wage scales of all positions;

i. list of all employees hired to replace the individuals discharged to include, starting wages, increases, present wages, and positions;

j. application for employment on all individuals discharged;

k. evaluation reports on all individuals discharged;

l. letter of Merit or Commendation on all individuals discharged;

m. a copy of the Company's Handbook;

Interrogatory No. V: Any and all personnel records, usually maintained by the Company, regarding the following individuals (Plaintiffs); (a) L. N. McDonald, and (b) Raymond Laird. Including, but not limited to, their payroll records, any evaluation reports made on them, and any written memoranda relating to their proficiency.

Interrogatory No. VI: Copy of the Company's collective bargaining agreements with amendments, additions, etc.

Interrogatory No. VII: Any and all records relating to past disciplinary action against Company employee, Charles Jackson.

Interrogatory No. VIII: A copy of any grievances filed by Plaintiffs L. N. McDonald and Raymond Laird.

Interrogatory No. IX: A copy of the arbitration dispute and the arbitration award.

Interrogatory No. V: What officer of your Company initiated charges of mis-appropriating Company property against the Plaintiffs, L. N. McDonald and Raymond Laird?

Interrogatory No. XI: Why was Company employee Charles Jackson retained in the Company's employ after being charged with mis-appropriating Company property?

Interrogatory No. XII: Were Plaintiffs discharged for reasons other than race, if so, what were those reasons and what written documentary support does the Company have for those reasons?

Dated: February 22, 1972

/s/ JAMES BULLOCK

James Bullock
Attorney for Plaintiffs
4719 Dowling Street
Houston, Texas 77004
(713) 529-4701

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

ANSWERS OF THE SANTA FE TRAIL TRANSPORTATION COMPANY TO PLAINTIFF'S INTERROGATORIES

D. H. STRATTON, Houston Terminal Manager of The Santa Fe Trail Transportation Company, having been duly sworn, makes the following Answers to Interrogatories propounded to The Santa Fe Trail Transportation Company by L. N. McDonald and Raymond Laird, plaintiffs in the above entitled cause, such Answers to Interrogatories bearing the same number as Plaintiffs' Interrogatories.

I.(a) L. N. McDonald was discharged because of his dishonesty in the theft of company freight off of company equipment on company property and for violation of company rules.

(b) Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules.

II. This defendant objects to the form of the question, in that it is no question at all, but appears to be a demand for production of a document, which is neither authorized nor required by Rule 33; however, disciplinary action is that outlined in Article 46, Section 1 of Defendant's Contract with the International Brotherhood of Teamsters.

III. Copies of said Contract are delivered to each of defendant's employees by the Union.

IV.(a) L. N. McDonald and Raymond Lee Laird were the only employees employed at defendant's Houston Terminal by this defendant, who were discharged between January 1 and December 31, 1970.

(b) Date of their discharges was October 2, 1970.

(c) L. N. McDonald was initially employed on June 27, 1962, and Raymond Lee Laird was initially employed on July 27, 1961.

(d) McDonald's position, prior to discharge, was that of driver, and Laird's position or positions, prior to discharge, were that of driver, General Dock Foreman and Transportation Supervisor.

(e) McDonald, according to this defendant's latest information, resides at 301 Bryan Street, Houston, Texas, with Telephone Number 923-5453; Laird, according to this defendant's information, resides at 702 Janisch, Houston, Texas, with Telephone Number 697-7810.

(f) Same Answer as the Answer to Interrogatory No. I.

(g) White.

(h) McDonald, at time of termination, was employed at a wage scale of $4.45 per hour; Laird was employed, at the time of termination, at the rate of $800.00 per month.

(i) Laird was replaced by Roger C. Lowery, at a starting salary of $895.00 per month; however, Mr. Lowery terminated his employment on August 18, 1971. No particular replacement was hired to fill the vacancy created by McDonald's termination.

(j) This defendant objects to the form of questions, in that they are

(k) not questions at all, but appear to be a demand for production of

(l) documents, which is neither authorized nor required by Rule 33

(m) (This Answer applies to (j), (k), (l) and (m).

V. This defendant objects to the form of questions, in that they are

VI. not questions at all, but appear to be a demand for production of

VII. documents, which is neither authorized nor required by Rule 33.

VIII. (This Answer applies to V, VI, VII, VIII and IX).

IX.

X. No particular officer of the company initiated charges of misappropriating company property against the plaintiffs, L. N. McDonald and Raymond Laird, since the facts surrounding the events leading up to their termination were the result of a rather general investigation. D. H. Stratton, Terminal Manager at Houston, however, terminated their employ.

XI. Charles Jackson was not charged with mis-appropriating company property.

XII. Plaintiffs were discharged for reasons other than race. The reasons are outlined in Answer to Interrogatory No. 1, and the company has written Statements of the plaintiffs in support thereof.

(Jurat and Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

PLAINTIFF'S SECOND AMENDED COMPLAINT

I.

Comes now the Plaintiff, and as of course in accordance with Rule 15(a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1343 (4); 42 U.S.C., sec. 2000 e-5 (f) and 28 U.S.C. secs. 2201 and 2202. This is a suit in equity, authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000e et seq., providing for injunctive and other relief against racial discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. secs. 151 et seq., based on violations of fair representation owed to plaintiffs and the class they represents.

II.

Plaintiffs brings this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23

(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represents is composed of white persons who are employed or might be employed by the SANTA FE TRAIL TRANSPORTATION CO. at its Transportation Terminal located in Houston, Texas and who are members or might become members of the Local 988, who have been and continue to be or might be adversely affected by the practices complained herein. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race conditions of employment. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. Defendants have acted or refused to act on grounds generally applicable to the class.

III.

This is a proceeding for a declaratory judgment as to plaintiffs rights and for a preliminary and permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of (a) discriminating against plaintiffs and other white persons in this class because of race with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, SANTA FE TRAIL TRANSPORTATION CO. who are members of Local 988 in ways which deprive plaintiffs and other white persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race.

IV.

The plaintiff, L. N. McDonald is a white citizen of the United States and a resident of the City of Houston in the State of Texas. Plaintiff, L. N. McDonald has been employed by Defendant as a truck driver at its transportation terminal in Houston, Texas and is a member in good standing of Local 988 of the International Brotherhood of Teamsters.

The Plaintiff, Raymond L. Laird is a white citizen of the United States and is a resident of the City of Houston and the State of Texas. Plaintiff, Raymond L. Laird has been employed by Defendant as a dock foreman at its transportation terminal in Houston, Texas for about nine and one-half years and is a member in good standing of local 988.

V.

(A) Defendant, Santa Fe Trail Transportation Co. is a common carrier doing business in the State of Texas and the City of Houston. The Company operates and maintains Ground Transportation and is an employer within the meaning of 42 U.S.C. sec. 2000e (b) in that the company is engaged in an industry affecting commerce and employ at least twenty-five persons.

(B) Defendant, International Brotherhood of Teamsters Local 988, is a labor organization within the meaning of 42 U.S.C. secs. 2000e (d) and (c) in that International Brotherhood of Teamsters Local No. 988 is engaged in a industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievance, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of of the employees of the Company at its plants and other

facilities in and around the City of Houston in the State of Texas. The International Brotherhood of Teamsters Local 988 has at least twenty-five members.

VI.

The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory have been instituted and/or maintained by the defendants, as well as violations of the duty of fair representation owed to plaintiffs under 29 U.S.C. secs. 151 et seq.

(A) On or about October 2, 1970, the plaintiffs, L. N. McDonald and Raymond Laird were discharged from employment by Defendant, Santa Fe Trail Transportation Company without cause and on information and belief, Plaintiffs alleges that they were discharged of their race, Caucasian.

(B) On or about September 26, 1970, Plaintiffs, along with one negro employee, Charles Jackson were all charged jointly and severally charged with mis-appropriating company property, to-wit; ten cases of six one gallon cans of anti-freeze, all of which were part of a shipment of twenty-five cases being shipped to Defendants' customers.

(C) On October 2, 1970, Defendant discharged Plaintiffs, L. N. McDonald and Raymond L. Laird while retaining the negro employee, Charles Jackson in its employ, Plaintiffs alleges that Defendant imposed a more severe disciplinary sanction against them because of their race, Caucasian than against their negro counterpart.

(D) On or about October 2, 1970, Plaintiffs filed a grievance with the Local Union 988 pursuant to the Article 44 of its collective bargaining agreement in accordance with the Procedure outlined for settling such disputes.

(E) On or about April 3, 1971, Plaintiffs were notified in writing by Local Union 988 that it would not pursue the claim or grievance any further and would not seek arbitration.

(F) On or about April 7, 1971, Plaintiffs filed a complaint with the E.E.O.C. which was approximately six months and three days from the day the grievance was first filed with the Union. Plaintiffs alleges that the delay in filing with the E.E.O.C. was consumed in grievance procedures under an existing collective bargaining agreement and that the 90-day statute was tolled during such period.

VII.

On April 7, 1971, Plaintiffs filed a timely and proper complaint before the Equal Employment Opportunity Commission (E.E.O.C.) alleging denial by Defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq. On July 15, 1971, the Commission notified plaintiffs under the provisions of Section 706 (e) of Title VII of the Civil Rights Act of 1964, the plaintiffs had the right to bring a civil action in a United States District Court.

Neither the State of Texas nor the City of Houston has a law prohibiting the unlawful employment practices alleged herein.

VIII.

Plaintiffs does hereby incorporate and adopt by reference all of the allegations set forth in Paragraph I through VII of this complaint.

IX.

At all times material herein Local 988 and the International Brotherhood of Teamsters have been certified recognized representives under the National Labor Relations Act of the plaintiffs and the class they represent.

X.

Defendants, International Brotherhood of Teamsters and Local 988 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices complained of in Paragraph VI and they have failed to protect the White members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XI.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set forth herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiffs and the class they represents a permanent injunction enjoining the defendant Santa Fe Transportation Co. its agents, successors, employees, attorneys and those acting in concert with it at its direction from continuing to maintain discriminatory disciplinary policies that imposes more severe disciplinary sanctions against Plaintiffs because of their race, Caucasian than against their Negro counter-part, denying Plaintiffs rights to equal treatment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

2. Grant Plaintiffs a preliminary injunction ordering the Defendant, Santa Fe Trail Transportation Co. to reinstate L. N. McDonald and Raymond L. Laird with all back pay wages lost, monetary losses and seniority lost as a result of the discriminatory discharge.

3. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant, International Brotherhood of Teamsters Local 988, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiffs to be impartially and fairly represented on the basis of merit rather that race, and the right to equal representation as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000e et seq.

4. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant International Brotherhood of Teamsters Local 988 its agents, successors, employees, and those acting in concert with it from refusing to properly and diligently represent plaintiffs and the class they represent.

5. Order the Defendants to take that affirmative action necessary to correct the practices, policies, customs and usages which discriminates against Plaintiffs and members of the class plaintiffs represents because of their race, Caucasian.

6. Plaintiffs further prays that this Court will allow them cost herein, reasonable attorney's fees and grant such further additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

JAMES BULLOCK
Attorney at Law
4719 Dowling Street
Houston, Texas 77004
713-529-4701

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

COMBINED NOTICE OF AND
MOTION TO DISMISS

TO: Mr. James Bullock, Attorney for the Plaintiffs
Bullock, Jackson and Rogers
4719 Dowling Street
Houston, Texas 77004

Please take notice that the undersigned will move this Honorable Court at the Courtroom in the Federal Building at 515 Rusk Avenue on the 13th day of August, 1973, at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard for an order dismissing the above entitled and numbered civil action against Defendant, Teamsters Freight, Tank Line & Automobile Industry Employees, Local Union No. 988, on the grounds set out below.

Defendant Union will seek an order from the Court dismissing this action as to it on the basis that:

1. The Court lacks jurisdiction over Defendant Union under the Title VII allegations of the Complaint (42 U.S.C. Section 2000e-5(f), 2201 and 2202) because Plaintiffs have not filed a sworn charge with the Equal Employment Opportunity Commission alleging that defendant Union has committed discriminatory employment

practices against either Plaintiff. Since such a charge is a jurisdictional prerequisite to the institution of a civil suit, it follows that the Title VII allegations in the Complaint should be dismissed as to Defendant Union for failure to exhaust the administrative remedies available in the statute.

2. It is questionable as to whether the provisions of 42 U.S.C. Section 1981 apply to the two Caucasian Plaintiffs.

3. Plaintiff, Raymond L. Laird, a member of the supervisory force of Defendant Employer was not within the coverage of the collective bargaining agreement between Defendant Union and Defendant Employer. Defendant Union has no contractual or legal right to review discharges or other dispositions Defendant Employer may make of its supervisory and managerial forces. The Labor-Management Relations Act forbids unions to insist that employers treat or bargain with them in any respect concerning supervisors.

On the other hand, Defendant Union accepted the grievance of L. N. McDonald complaining of an unjust discharge, investigated and prosecuted said grievance to a final and binding award in the arbitration tribunal provided for in the collective bargaining contract between Defendant Employer and Defendant Union, thereby fulfilling its fair representation obligations.

For the reasons stated, the Complaint of L. N. McDonald and Raymond Laird fail to state a claim upon which relief can be granted against Defendant Local Union 988.

WHEREFORE, Defendant Union moves the Court for an order dismissing this action as to Defendant Union and for its costs.

Respectfully submitted,

James P. Wolf
Attorney in Charge

OF COUNSEL:

DIXIE, WOLF & HALL
Suite 401, 609 Fannin St. Bldg.
Houston, Texas 77002
223-4444
ATTORNEYS FOR DEFENDANT
LOCAL UNION NO. 988

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

DEFENDANT'S, TEAMSTERS LOCAL UNION NO. 988'S, BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

TO THE HONORABLE CARL O. BUE, JR.,
Judge, United States District Court:

Defendant Local Union No. 988 seeks an order from this Court for the dismissal of all or part of Plaintiffs' case against the Local Union. Because the Motion to Dismiss must be considered in respect to two separate Civil Rights Statutes, this memorandum will address itself to the different statutory requirements of the Court's jurisdiction.

I.

TITLE VII ALLEGATIONS AS TO DEFENDANT LOCAL UNION SHOULD BE DISMISSED

Plaintiffs did not file a charge with the Equal Employment Opportunity Commission alleging a violation of Title VII of the Civil Rights Act of 1964 by Defendant Local Union 988. Such a charge alleging that Defendant Local Union has committed discriminatory employment practices as defined by the Civil Rights Act of 1964 is a jurisdictional prerequisite to the institution of civil suit against Defendant Local Union under 42 U.S.C. Section 2000e, *et seq.* (See 42 U.S.C. Section 2000e-5.)

Precise authority for Defendant's contention in this regard is found in the Hallmark case of *Miller v. International Paper Company, et al.*, 409 F.2d 283, at 291 (5th Cir., 1969). See also *Beverly v. Lone Star Lead Crnst. Corp.*, 437 F.2d 1136 (5th Cir., 1971; *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir., 1970).

As dismissed in the pre-trial meeting, while it is true that Plaintiffs may proceed against Union Defendant under Title 42 U.S.C. Section 1981, if they have pled and proved sufficient excuse tor not filing charges against Defendant Union with the Equal Opportunities Commission, their cause of action against said Union Defendant must be limited to the Civil War statutes. *Water v. Wisconsin Steelworkers International Harvester*, 427 F.2d 478, 488 (7th Cir., 1970), cert. denied 400 U.S. 911.

II.

THE REMAINING ALLEGATIONS UNDER SECTION 1981 SHOULD BE DISMISSED

Without attempting to resolve any question about failure to exhaust the Title VII remedy as a prerequisite for a Section 1981 suit. Defendant Local Union submits that there is a serious question as to whether two Caucasians can sue Defendant Local Union under Section 1981. Section 1981 provides that all persons within the United States shall have the same rights as "is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." In *Jones v. Alfred H. Meyer Co.*, 392 U.S. 362 (1968), the Supreme Court traced the origin of Section 1981. Its review of the history of the Civil Rights Act following the Civil War showed that its concern was to make certain that the laws of the country

would apply thereafter without regard to any previous condition of slavery or involuntary services. The Acts were directed with particularity towards the rights of black people because these were the people who had been discriminated against and who had been in a condition of involuntary servitude. We concede that the literal purpose of the Act is to guarantee equal rights to all citizens regardless of race or previous condition of servitude. But since the literal terms of the Act equate the protection with the rights of white citizens and its purpose was to relieve black people of unequal treatment, it would appear to follow that it is necessary to plead and prove that these Plaintiffs have been denied rights enjoyed by other white citizens. This has not been done; at most, Plaintiffs' petition amounts to a complaint that a black employee was dealt with more leniently for the same misdeed because they were Caucasians.

Other than the bare bones conclusion alleged about discipline imposed as between three persons, Plaintiffs have not plead any detrimental classification of whites or any specific qualifications or actions designed to deprive them of the right of white citizens. To the contrary, the Complaint shows that one of the Plaintiffs occupied a supervisory position.

We do not propose to mislead the Court on this point. We do not know of any definitive ruling on this subject by the Supreme Court. The cases that have permitted suit by whites under this section have generally fallen into a category where restrictive classifications of a particular group were imposed so as to deprive some citizens of rights that should have been available for all. Plaintiffs' pleading at this juncture does not allege such a situation and for this reason we say its allegations under Section 1981 should be dismissed.

If the mere allegation that they were discharged because they were caucasian is enough to preserve the issue, we will reurge this motion at a later point.

III.

THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND/OR BARRED

Plaintiff, Raymond L. Laird, is identified in Plaintiff's petition as a dock foreman for Defendant Employer. As such he is part of supervision and is not part of the appropriate bargaining unit covered by the terms of the collective bargaining agreement in effect between Defendant-Employer and Defendant Local Union.

The Congress of the United States amended the original Labor Act known as the Wagner Act in 1947 by passage of what was popularly known as the Taft-Hartley Act. (29 U.S.C. Sec. 141, et seq.) One of main items of controversy in these amendments was the Congressional action which removed supervisors from the bargaining unit and representation by unions. In *NLRB v. Edward G. Budd Manufacturing Company*, 169 F.2d 571 (6th Cir., 1948), cert. den'd, 335 U.S. 908 (1948), the Sixth Circuit upheld the constitutionality of the supervisory amendments of Taft-Hartley. This decision was followed by a series of opinions by the Ninth Circuit, all of which were concerned with the efforts of the Union to compel the Employer to deal with the Union about supervisors. These opinions are reported as follows: *NLRB v. Retail Clerks*, 186 F.2d 371 (9th Cir., 1951); *NLRB v. Retail Clerks*, 203 F.2 165 (9th Cir., 1953); *NLRB v. Retail Clerks*, 211 F.2d 759 (9th Cir., 1954),

cert. denied 348 U.S. 839 (1954); *NLRB v. Retail Clerks*, 243 F.2d 777 (9th Cir., 1956).

The Ninth Circuit litigation above began on the basis of an agreed enforcement order which required the union not to refuse to bargain with the Employer "by insisting or demanding as a condition to such bargaining that Safeway, the Employer, bargain collectively for supervisory employees." In 203 F.2d 165, the Ninth Circuit determined the Union was in contempt of the agreed enforcement order because the Union imposed as a condition to its bargaining that Safeway bargain about location managers which the Board held to be supervisors. After finding the Union in contempt because of its insistence that the Employer treat with it concerning supervisors, the Court found that the Union was prohibited from making demands which covered supervisory employment and working conditions, what work the supervisors may do, and who may be employed as supervisors.

In the course of its opinion, the Court held that the legislative history of Taft-Hartley had as a primary objective "to assure to the Employer his right to procure the loyalty and efficiency of his supervisors and managers." The Court found that Congress had decided it could remedy certain evils by the supervisory amendment and that it had laid much emphasis upon the desirability of making supervisors independent of union and of rank and file in the appropriate bargaining units. Employers would be sharply restricted in obtaining loyal and efficient supervisors if the Union could intrude in the relationship between supervisors and the Employer. The Court found that the purpose of Congress in the amendment was to avoid the encroachment upon the

rights of employers to select and control supervisors and to obtain their full loyalty and cooperation without interference from the union.

In 1952, the *Texas Company v. NLRB*, 198 F.2d 540 (C.A. 5, 1952), the Fifth Circuit laid down the rule that supervisors may be discharged for refusing to perform bargaining unit work behind a picket line. The Employer had decided to resume production operations while the strike was in effect and a foreman was assigned to do operations work which was normally performed by employees in the collective bargaining unit. The particular foreman declined because of his long membership in the union in past years when he had been a member of the bargaining unit, and in part, allegedly, because of physical fear. He was discharged. The Board attempted to reinstate the foreman because the reason for his discharge was concerted activity which would have been unlawful if he had been an employee. In rejecting the Board's position, the Court referred to the legislative purpose to remove supervisors from the Act and place them in management, thereby restoring to the employers the rights and power to insist on their undivided loyalty. In particular, the court quoted Senator Taft's remarks that foremen must be made "wholly loyal" and that in between steps had been considered but rejected by the Congressional Committee because foremen had to be entirely management. See also *Typographical Union, Local 38 v. NLRB*, 365 U.S. 705 (1961), enf. 278 F.2d 266 (1st Cir. 1960).

Supervisors at Santa Fe are not included in the bargaining unit covered by the collective bargaining contract. Defendant Employer has not and does not agree that Defendant Union can represent or bargain for supervisors and it would be a violation of the Federal Labor Law for

Defendant Local Union to attempt to represent supervisors over objection by the Employer. There is no duty of fair representation to supervisors imposed on Defendant Local 988 by the Labor Management Relations Act and there is no contractual duty owed to them. To the contrary, Defendant Local Union is prohibited from such representation in the circumstances of the instant case. The National Labor Relations Board is prohibited from finding a unit appropriate for bargaining if it includes supervisors.

Since Defendant Union had nothing to do with causing or bringing about the discharge of Raymond L. Laird and the only complaint addressed to it is the claimed failure of duty of fair representation, it follows that the remainder of the complaint dealing with Section 1981 and the duty of fair representation as to Raymond L. Laird should be dismissed.

Further, the complaint of L. N. McDonald should be dismissed because his discharge has already been submitted to final and binding arbitration. Defendant Local Union investigated and vigorously processed his discharge grievance to final arbitration. Although there is some area of uncertainty as to the effect of arbitration in this area, there is compelling judicial authority for the proposition that the arbitration decision is binding on the affected employee, as well as the Union and the Employer and is a bar to a Title VII suit. A ruling to this effect is found in *Dewey v. Reynolds Metal Company*, 429 F.2d 324 (6th Cir., 1970), affirmed by an equally divided Supreme Court, 91 S.Ct. 2186 (1971).

We candidly state to the Court that this proposition is not yet sharply etched in black and white in the existing

law. We are aware that a different doctrine had been enunciated in the Fifth Circuit. Even so, the original Fifth Circuit doctrine that arbitration was no bar to this type of action is currently undergoing modification.

The question of arbitration as a bar to a Title VII action was again considered in *Rios v. Reynolds Metals Company* 467 F.2d 54 (5th Cir., Sept. 1972), 5 F.E.P. Cases 1. The Court reviewed its decision in *Hutchins v. United States Industries, Inc.*, 428 F.2d 303, stating that it had touched on the arbitration question in a peripheral manner in said case. Although the Circuit did not rely on the *Dewey* case, supra, and its affirmation by the Supreme Court, the Court modified its original doctrine by holding that a Federal District Court could exercise its discretionary power of deferring matters such as discharge to arbitration comparable to the action of the National Labor Relations Board. The Federal Board doctrine requires arbitration proceedings to be fair and regular with all parties having agreed to be bound and that the decision of the Arbitration Panel be not clearly repugnant to the purposes and policies of the Act. The Circuit Court approved this test.

The contract itself expressly prohibits discrimination for racial reasons. Plaintiff McDonald has not alleged that the arbitration proceedings he participated in was not fair or regular or that the decision of the panel was clearly repugnant to the purposes and policies of the Act. It appears that this doctrine may still be developing in this Circuit, as well as in other circuits in the country. Other expressions on this point are to be found in *Taylor v. Springmeyer Shipping Company*, ____ F. Supp. ____, Western District of Tennessee (July, 1971), 4 F.E.P. 322. There the court granted Defendant's motion for

summary judgment on the authority of *Dewey v. Reynolds Metals Company*, supra. In *Phillips v. Columbia Gas of West Virginia, Inc.*, 347 F.Supp. 533 (Sept. 1972), the court ruled on whether or not an employer and union were entitled to a summary judgment in an action under 42 U.S.C. Section 1981 by a Caucasian employee claiming racial discrimination to be the cause of his discharge. As part of this finding, the court found that Defendant Union in processing the Plaintiff's grievance through the steps provided for in the collective bargaining agreement, including the arbitration hearing, fairly and adequately represented him.

The court relied on the Supreme Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), for the legal standards under which a union could be liable for a breach of the duty of fair representation. It found the Union had fulfilled its duty by arbitrating the matter.

WHEREFORE, premises considered, Defendant Local Union 988 prays that its motion to be dismissed be granted and that it go hence without day.

Respectfully submitted,

James P. Wolf
Attorney in Charge

OF COUNSEL
DIXIE, WOLF & HALL
Suite 401, 609 Fannin St. Bldg.
Houston, Texas 77002
223-4444
ATTORNEYS FOR LOCAL UNION NO. 988

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEFENDANT LOCAL UNION NO. 988's FIRST AMENDED ANSWER

COMES NOW Teamsters Freight, Tank Line & Automobile Industry Employees, Local Union No. 988, captioned International Brotherhood of Teamsters Local No. 988 in Plaintiffs' Second Amended Complaint, and hereafter known as Local No. 988, and files this response to the said Complaint, showing the Court as follows:

I.
FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted. The Complaint is also deficient as a class action because Plaintiffs cannot be said to fairly insure the adequate representation of the alleged class and, therefore, it is not a proper class action within the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure. The alleged right sought to be enforced by this complaint is not typical or limited to the claims of the affected class and many questions of law and/or facts asserted as affecting the civil rights of employees are not common.

II.
SECOND DEFENSE

This Court is without jurisdiction of Defendant Local Union No. 988 as to its Title VII allegations because Plaintiffs have not complied with the filing requirements of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-

5(e). A charge against Defendant Local No. 988 is a jurisdictional prerequisite under the terms of the Act.

III.
THIRD DEFENSE

Plaintiffs' Complaint fails to state any reasonable basis or excuse for failing to utilize the remedies provided by Title VII. Further, Plaintiff has failed to utilize or exhaust their contractual, their internal Union remedies, or their remedies under the Labor-Management Relations Act before bringing this action. For these reasons the Complaint should be dismissed as to Local Union No. 988.

IV.
FOURTH DEFENSE

Except for conclusionary allegations claiming discriminatory policies, practices, customs and usages which discriminate against members in the alleged class of Caucasians, the Complaint, renders down to an allegation that the two white Plaintiffs were discharged on or about October 2, 1970 by Defendant-Employer on charges that Plaintiffs had misappropriated Company property. The Complaint concludes because the Plaintiffs and one Negro employee were charged with misappropriation of Company property and the Negro employee was not discharged that Defendant-Employer imposed different discriminatory discipline sanctions against them because of their Caucasian race than against their Negro counterpart.

The Complaint identifies Plaintiff Raymond L. Laird as a dock foreman at the Company's Houston Terminal. As such, Plaintiff Laird differs from Pliaintiff L. N. McDonald in that Plaintiff Laird as a foreman and supervisor is not within the appropriate unit for bargaining nor with-

in the contract covering said appropriate unit. Defendant Union is prohibited from requiring the Company to recognize it as the representative of foremen or supervisory personnel by the Labor-Management Relations Act., 29 U.S.C. 151 et seq. The statutory difference between the two Plaintiffs not only shows that a class action does not exist in this case but explains why a grievance concerning the discharge of Plaintiff McDonald was processed by Defendant Local Union but was not for Laird. A copy of this grievance marked Exhibit A-1 and A-2 is attached to this answer. The Complaint should be dismissed as to Plaintiff Laird, because Defendant Local 988 has no statutory or contractual right or duty to interfere with Defendant-Employer's selection of its supervisory personnel.

On the other hand, Plaintiff McDonald's grievance complaining that his discharge was forbidden by the contract because it was not for just cause, was processed through the steps of the contract and taken to final binding arbitration by the Union in compliance with the contractual terms. The Award denying Plaintiff McDonald's grievance was final and binding on all parties.

The collective bargaining contract in effect between Defendant Union and Defendant-Employer, protects employees against discharge or suspension except for just cause and also contains a clause against non-discrimination. It reads as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring compensation, terms or conditions or employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities be-

cause of his race, color, religion, sex or national origin.

Plaintiff L. N. McDonald elected to pursue his contractual remedies for his discharge and any alleged discrimination on or about October 8, 1970. The main issue as to whether Plaintiff was discriminated against unjustly by a discharge has been judicially and finally decided by an arbitration tribunal of competent and proper jurisdiction in accordance with the collective bargaining contract. After full hearing, his grievance was denied on or about October 21, 1970. Plaintiff McDonald's Complaint should be dismissed because this action for discriminatory discharge is barred because he elected to have his claim determined through the grievance procedure in the collective bargaining agreement and is now estopped from asserting the same claim in a new form in this action.

V.

FIFTH DEFENSE

Without waiver of the foregoing defenses, and subject thereto, Defendant Local No. 988 further responds to Plaintiff's pleading as follows:

1. Defendant Local 988 denies jurisdiction of the Court here under Title VII of the Civil Rights Act of 1964, or under 42 U.S.C. Section 1981 and 1983, for the reasons stated above.

2. Defendant denies that this is a proper procedure for a Declaratory Judgment or that this is a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

3. Although Plaintiff alleges a class composed of Caucasians who are employed, or might be employees of Defendant company, it has not shown a classification of

white persons which establishes that Caucasians are treated different from white persons by this Employer. As a matter of fact, one Plaintiff is a member of supervision and the other Plaintiff is a rank and file member of the appropriate bargaining unit. Congress has eliminated supervisory employees from the definition of employee in the Labor Management Act. The same Act prohibits Unions from requiring an employer to recognize them as representatives of supervisory employees or to bargain concerning supervisory conditions of work hire or tenure. Defendant deny their common questions of law and fact affecting the rights of these Plaintiffs or members of the alleged class. Defendant further denies that it has caused members of the alleged class or any class to be limited or classified and discriminated against in ways which deprive or tend to deprive them of equal employment opportunities or otherwise affect their status as employees because of race.

4. The allegations of Plaintiffs in paragraph IV are admitted except for the fact that Plaintiff Raymond L. Laird has been on withdrawal status from membership since his promotion to foreman at Defendant-Employer.

5. Defendant is without knowledge as to exact operations of Defendant Santa Fe Trail Transportation Company, but admits that it is a labor organization within the meaning of 42 U.S.C. Section 2000 (e)(d)(c).

6. Defendant denies that it has instituted or maintained unlawful policies, practices, customs or usages or that it has violated any duty of fair representation owed to Plaintiffs under 29 U.S.C. Section 151, et seq.

(A) Plaintiffs were discharged by Defendant-Employer. The only information furnished to Defendant Local 988,

was that the discharge was for misappropriation of property.

(B) Defendant admits that Plaintiff L. N. Laird was charged with misappropriating Company property on or about September 26, 1970.

(C) Admitted except for the statement that Defendant-Employer imposed a more severe disciplinary action against the two caucasions because of race than their negro counterpart. Defendant Local Union was informed by Defendant-Employer that Plaintiff McDonald was discharged for misappropriation of Company property. It has no basis for believing that Defendant-Employer has imposed different conditions on caucasians than negroes.

(D) Admitted that Plaintiff L. N. McDonald filed a grievance on or about October 8, 1970. There is no record of Plaintiff Laird filing a grievance under the contract.

(E) Denied. Defendant Local 988 processed the grievance of Plaintiff through the contractual grievance procedure to final arbitration hearing at Biloxi, Mississippi, beginning on October 19, 1970. The decision of the arbitration tribunal in October, 1970, was a denial of the grievance with costs against the Union.

(F) Defendant Local 988 is without sufficient knowledge to enable it to either affirm or deny allegation of Plaintiffs in Paragraph VI (F).

7. Defendant Local 988 denies that Plaintiffs filed a timely Complaint before the Equal Employment Opportunities Commission, alleging a denial of their rights by Defendant Local 988, under Title VII of the Civil Rights Act.

8. Defendant Local 988 admits it is a signatory party to the collective bargaining agreement.

9. Defendant Local 988 denies that it has violated or continues to violate its duty of fair representation required by the Labor Management Relations Act. It denies that it acquiesced and/or joined in any unlawful or discriminatory practices or that it has failed to protect the white members of the bargaining unit or any members of the bargaining unit from discriminatory policies or practices. Defendant Local 988 is not authorized to act as an agent or a representative in this action for the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America.

10. Defendants deny that Plaintiffs have no plain adequate or complete remedy at law to redress the alleged wrongs stated in their Complaint in that complete relief and remedies for the same are provided in:

(a) the current collective bargaining agreement,

(b) Section 301 of the Labor Management Relations Act,

(c) remedies provided for in the Local Union and the International Union's Constitution and By-Laws.

(d) the Labor Management Relations Act.

Further, there is no reparable injury in the substance of Plaintiffs' Complaint that cannot be adequately remedied by this Court without resort to injunctive relief.

11. Defendant specifically denies that it has instituted, maintained and/or acquiesced in discriminatory practices, policies, customs and usages or that it denied Plaintiffs, or other employees, a fair representation because of race, or that it has in any way adversely affected the status of any

employee for discriminatory reasons. Defendant has not acquiesced in any policy, practice, custom or usage that would circumvent its collective bargaining contract which strictly requires that all persons in the bargaining unit be treated equally and without discrimination. Defendant denies it has conspired or acted in collusion with Defendant-Employer to deny these Plaintiffs or any employee of any rights. Defendant also denies that it breached its duty of fair representation or acted arbitrarily, capriciously, in bad faith or for any invidious motivation toward these Plaintiffs. To the contrary, in regard to Plaintiff Employee L. N. McDonald, who filed a grievance, the Union represented him fully, fairly and vigorously in his grievance to a final and binding arbitration award. The final award denied the grievance with costs to the Union.

WHEREFORE, premises considered, Defendant Local Union No. 988, prays that upon final trial and hearing hereof, the Plaintiffs' actions be dismissed in its entirety as to Defendant Local Union No. 988, and that Plaintiffs take nothing and that Defendant recover all costs of court incurred and have such other and further relief, both general and special, legal and equitable, to which it may show itself entitled.

Respectfully submitted,

_____

James P. Wolf
Attorney in Charge

OF COUNSEL:

DIXIE, WOLF & HALL
Suite 401, 609 Fannin Street
Houston, Texas 77002
713/223 4444
ATTORNEYS FOR DEFENDANT LOCAL No. 988

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

ORIGINAL ANSWER OF DEFENDANT, THE SANTA FE TRAIL TRANSPORATION COMPANY

Comes now THE SANTA FE TRAIL TRANSPORTATION COMPANY, one of the defendants herein, and files this, its Answer to Plaintiffs' Second Amended Complaint, and would show the court as follows:

I.
FIRST DEFENSE

The Complaint fails to state a claim as a class-action upon which a class-action relief may be granted, in that members of the alleged class are not so numerous as to make it impractical to bring them before the Court and that the claim asserted by the plaintiffs is not typical of alleged claims of the affected class, and that the relief sought does not represent nor is typical or limited to the claims of the affected class which would present many questions of law and/or fact not common to the Complaint of these plaintiffs, and that the plaintiffs cannot be said to be representative parties who will fairly and adequately protect the interests of the affected class.

II.
SECOND DEFENSE

This Court is without jurisdiction in that plaintiffs fail to comply with 42 USC Sec. 2000e-5(d).

III.
THIRD DEFENSE

Plaintiff McDonald elected to pursue his contractual remedies for his discharge by filing a Grievance under the Collective Bargaining Agreement between employer and the co-defendant Union, which proceeded to binding arbitration after a full hearing, which arbitration was concluded in October, 1970, after which plaintiff McDonald failed to timely file written Complaint with the Equal Employment Opportunity Commission.

IV.
FOURTH DEFENSE

The Complaint fails to state a cause of action upon which relief may be granted under the provisions of 42 USC Sec. 1981, because the two (2) white plaintiffs are not believed to be within a class protected by such provisions, as a matter of law.

V.
FIFTH DEFENSE

Without waiving the foregoing defenses and subject thereto, defendant further responds to Plaintiffs' Second Amended Complaint, as follows:

1. This defendant denies jurisdiction of the Court under Title VII of the Civil Rights Act of 1964 or under 42 USC Secs. 1981 and 1983.

2. This defendant denies that this is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, and otherwise denies the allegations of Paragraph II.

3. This defendant denies that this is a proper procedure for a Declaratory Judgment or for injunctive relief.

4. The allegations of Paragraph IV of Plaintiff's Complaint are admitted, except that this defendant denies, on information and belief, that plaintiff, Raymond L. Laird, is a member in good standing in Local 988, and denies that he was employed as Dock Foreman for this defendant for nine and a half (9½) years. Plaintiff Laird was employed as Docket Foreman at the time of his termination but had not been employed in that capacity for nine and a half (9½) years.

5. This defendant admits the allegations of Paragraph V as to it, but does not have sufficient information to either admit or deny the allegations as to International Brotherhood of Teamsters Local No. 988.

6. This defendant denies the allegations of the first paragraph of Paragraph VI.

(a) This defendant admits that plaintiffs, L. N. McDonald and Raymond Laird, were discharged from employment by this defendant on or about October 2, 1970, but denies that they were discharged by reason of their Caucasian race.

(b) This defendant denies that plaintiffs, along with one negro employee, Charles Jackson, were all charged jointly and severally with misappropriating company property, but admits that a general investigation of misappropriated cargo and cargoes, including ten (10) cases of six (6) one-gallon cans of anti-freeze, was instituted and conducted, along with an investigation of possible violation of company rules, which investigation did include plaintiffs, Laird and McDonald, and employee, Charles Jackson, and others.

(c) This defendant admits that on or about October 2, 1970, plaintiffs, L. N. McDonald and Raymond Laird, were discharged, and admits that negro employee, Charles Jackson, was not discharged, but denies any discrepancy in disciplinary sanctions among or between these employees by reason of their race.

(d) This defendant admits that plaintiff, L. N. McDonald, filed a Grievance on or about October 2, 1970, but, on information and belief, denies that plaintiff Laird filed a Grievance with said Union under its Collective Bargaining Agreement with this defendant.

(e) This defendant denies the allegations of Paragraph (e).

(f) This defendant does not have sufficient knowledge to either admit or deny the allegations of Paragraph (f), though the copy of written Complaint of L. N. McDonald, furnished to this defendant, was dated after April 7, 1971.

7. This defendant denies the allegations of Paragraph VII, insofar as such allegations claim a timely and proper filing of Complaint.

8. The allegations of Paragraph VIII, insofar as it incorporates and adopts by reference allegations previously denied by this defendant, are again denied.

9. This defendant admits that it and Local 988 are signatory parties to a Collective Bargaining Agreement.

10. The allegations of Paragraph X directed to this defendant are denied and, insofar as this defendant knows or believes, the defendant, International Brotherhood of Teamsters Local 988, has violated no duty as to their representation imposed upon it by the National Labor Relations Act, and this defendant, denying any unlawful

and discriminatory practices complained of in Paragraph VI, therefore, denies any acquiescence and/or joining in any such alleged practices, since it is denied that any such practices exist.

11. The allegations of Paragraph XI are denied.

12. It is denied that plaintiffs are entitled to the relief sought in their prayer.

WHEREFORE, premises considered, this defendant prays that, upon final trial and hearing hereof, the plaintiffs' action be dismissed in its entirety as to this defendant, and that plaintiffs take nothing and that this defendant recover all costs of Court incurred and such other and further relief to which the Court may find this defendant to be entitled.

Respectfully submitted,

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____

Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Professional
Building
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

DEFENDANT'S, THE SANTA FE TRAIL TRANSPORTATION COMPANY'S MOTION TO DISMISS

TO THE HONORABLE COURT:

Comes now THE SANTA FE TRAIL TRANSPORTATION COMPANY, one of the defendants in the above entitled and numbered cause, and makes and files its Motion to Dismiss respective plaintiff's' above entitled action against defendant, The Santa Fe Trail Transportation Company, and, as grounds therefor, would respectfully show the Court as follows:

I

Defendant, The Santa Fe Trail Transportation Company, moves this Court for an Order dismissing the above entitled action as a class action on the grounds that the Complaint fails to state a claim entitling plaintiffs to relief in a class action, on the following grounds:

a. Members of the alleged class are not so numerous as to make it impractical to bring them before the Court.

b. Plaintiffs' Complaint states only one instance of alleged racial discrimination in the discharging of the two (2) white plaintiffs-employees and failure to discharge

one (1) negro employee; therefore, the claim is not typical of alleged claims of the affected class.

c. The broad, unspecified allegations of discrimination of the affected class presents many questions of law and/or facts not common to the Complaint of these plaintiffs.

d. Plaintiffs cannot be said to be representative parties who will fairly and adequately protect the interest of the affected class.

II.

This defendant moves the Court for an Order dismissing the above entitled action for want of jurisdiction on the grounds that plaintiffs failed to comply with 42 U.S.C. 2000e-5(d). As shown by Plaintiffs' Complaint, the alleged unlawful employment practice upon which plaintiffs rely herein occurred on October 2, 1970, and, as further shown by Plaintiffs' Complaint, a written charge by plaintiffs, complaining of unlawful employment practices was not filed with the Equal Employment Opportunity Commission until April 7, 1971, some one hundred eighty-seven (187) days after the alleged occurrence; and, as further alleged in Plaintiffs' Complaint, neither the State of Texas nor the City of Houston has any law prohibiting the alleged unlawful employment practices complained of by plaintiffs herein. As to the respective plaintiffs, this defendant specifically alleges:

a. Plaintiff, L. N. McDonald. The Second Amended Complaint alleges that plaintiffs filed a Grievance with Local Union 988 in a proceeding under the Collective Bargaining Agreement between said Local and the de-

fendant-employer. In truth and in fact, however, plaintiff McDonald did file such a Grievance on or about October 2, 1970, such Grievance proceeding to arbitration on October 29, 1970. Accordingly, even if limitation be tolled during such time, McDonald failed to file the written Charge with the Equal Employment Opportunity Commission within ninety (90) days after determination of his rights under the Collective Bargaining Agreement, so that he has still not met the ninety (90) days filing requirement prerequisite to the institution of suit.

b. Plaintiff, Raymond Laird. He was a member of the supervisory force of defendant-employer and was not within the coverage of the Collective Bargaining Agreement between defendants Union and employer. Laird never filed a written Charge with the Equal Employment Opportunity Commission and, even if the Charge filed by McDonald encompasses Laird, plaintiff Laird has no excuse or justification for failing to file a written Charge with the Equal Employment Opportunity Commission within ninety (90) days of the alleged occurrence of discrimination, which is a condition precedent and a jurisdictional prerequisite to filing of suit herein.

III.

Defendant moves the Court for an Order dismissing the above entitled action insofar as it seeks relief under the provisions of 42 U.S.C. Sec. 1981, because the two (2) white plaintiffs are not believed to be within a class protected by such provisions.

WHEREFORE, premises considered, defendant, The Santa Fe Trail Transportation Company, respectfully moves the Court to dismiss plaintiffs' action against said defendant.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____

Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Prof. Bldg.
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

NOTICE OF MOTION

TO: MR. JAMES BULLOCK, 4719 Dowling Street, Houston, Texas 77004, Attorney for Plaintiffs; and MR. JAMES P. WOLF, Dixie, Wolf & Hall, Suite 401, 609 Fannin Street, Houston, Texas 77002, Attorney for Defendant, Local Union No. 988:

Please take notice that the undersigned will bring the above and foregoing Motion on for hearing on Monday, December 3, 1973, or as soon thereafter as counsel may be heard.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____

Benjamin R. Powel
Attorney in Charge
Sealy & Smith Prof. Bldg.
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

DEFENDANT'S, THE SANTA FE TRAIL TRANSPORTATION COMPANY'S, BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

TO THE HONORABLE COURT:

Defendant, THE SANTA FE TRAIL TRANSPORTATION COMPANY, hereinafter referred to as "Employer", seeks an Order from this Court for the dismissal of all or part of respective plaintiffs' case against the Employer on the grounds that the Plaintiffs' Complaint does not state a proper class action under FRCP Rule 23, that this Court has no jurisdiction of plaintiffs' claim by reason of plaintiffs' failure to comply with 42 U.S.C. 2000e-5(d), and that plaintiffs, not being within a class protected by 42 U.S.C. Sec. 1981, the Court has no jurisdiction under that provision.

I.

PREREQUISITES TO A CLASS ACTION UNDER RULE 23 ARE NOT PRESENT AND CLASS ACTION SHOULD BE DISMISSED.

Plaintiffs' Complaint fails to set forth the four (4) prerequisites of a class action set forth in Rule 23a. Plaintiffs complain of one isolated action, wherein plaintiffs con-

clude that, because the white plaintiffs were discharged and one negro employee not discharged, different discriminatory discipline was imposed upon the white plaintiffs, because of their race. The Complaint does contain sweeping, unspecified allegations of discrimination, but fails to show a defined class and fails to show that members of any such alleged class are so numerous as to make it impractical to bring them before the Court.

Plaintiffs' Complaint does not set forth a claim typical of alleged claims of the affected class. Plaintiff McDonald was, at the time in question, a Driver and an employee protected by Collective Bargaining Agreement, with the right to assert a Grievance for discharge, to be processed by the defendant Local Union. On the other hand, plaintiff Laird was a Dock Foreman and Supervisor, not within the appropriate unit for bargaining or within the Contract covering employees similarly employed as plaintiff McDonald.

The questions of law and/or fact peculiar to the plaintiffs herein are not shown by the Complaint to be common to questions of law and/or fact which might arise or which might be proved under the broad, unspecified allegations of discrimination of the affected class, which might be raised on trial.

Plaintiffs cannot be said to be representative parties who will fairly and adequately protect the interests of the affected class. Plaintiff McDonald is of a class who had the opportunity to elect to pursue his contractual remedies through grievance procedure and arbitration, whereas plaintiff Laird, being a Docket Foreman and not afforded such contractural relief, is dissimilarly situated.

II.

TITLE VII ALLEGATION AS TO DEFENDANT SANTA FE TRAIL TRANSPORTATION COMPANY SHOULD BE DISMISSED.

The filing by plaintiffs of a written Charge with the Equal Employment Opportunity Commission within the ninety (90) day limitation period set forth in 42 U.S.C. Sec. 2000e-5(d), is a condition precedent and a jurisdictional prerequisite to plaintiffs' institution of this suit against this defendant in the District Court. *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (C.A. 7th); *Fore v. Southern Bell Telephone & Telegraph Co.*, 293 F. Supp. 587; *Banks v. Local Union 136, International Brotherhood of Electrical Workers*, 296 F. Supp 1188; *Cox v. U.S. Gypsum Co.*, 284 F. Supp 74; and *Boudreaux v. Baton Rouge Marine Contracting Co.*, 304 F. Supp 240. Plaintiff Laird is believed to have never filed a written Complaint with the Commission. Even if McDonald's written Complaint filed with the Commission is sufficient to encompass and include plaintiff Laird, plaintiff Laird, being a member of the supervisory force of the defendant-Employer, was not within the coverage of the Collective Bargaining Agreement between defendants, Union and Employer, and, having filed no contractual Grievance or proceeded under any Collective Bargaining Agreement, has no excuse for such late filing. It is admitted that the ninety (90) day time limitation may be tolled by the processing of contractual Grievances under authority of *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888 (5th Cir. 1970), but such tolling of the ninety (90) day filing prerequisite is not applicable to plaintiff Laird.

Even if the ninety (90)day filing prerequisite be tolled as to plaintiff McDonald, plaintiff McDonald's Grievance,

processed through the grievance and arbitration proceeding to binding arbitration between the Union and the Employer, was concluded in October, 1970, after which time more than ninety (90) days expired prior to McDonald's filing his written Complaint with the Equal Employment Opportunity Commission on April 7, 1971. Although the timely filing of a Grievance by a suspended employee is provided for in the Collective Bargaining Agreement between the Union and Employer, the subsequent processing of the Grievance tolls the time limitation and the limitation period then begins to run the day the arbitrators hand down their final decision, which terminates the formal Grievance procedure available under the Collective Bargaining Agreement. *Phillips v. Columbia Gas of W. Va., Inc.*, 347 F. Supp 533 (1972). Nor can a Complaint alleging a single act of discrimination or reason of wrongful discharge by reason of race be considered a continuing violation. *Phillips v. Columbia Gas of W. Va., Inc.*, supra.

III.

CLAIM UNDER SECTION 1981 SHOULD BE DISMISSED.

The Complaint shows that plaintiffs are white plaintiffs, alleging job discrimination.

Section 1981, however, provides that all persons within the United States shall have the same rights as "is enjoyed by white citizens, and shall be subject to like punishment, payments, penalties, taxes, licenses and exactations of every kind, and no other". Section 1981 has its genesis in the Civil Rights Act of 1866. The Act was directed with particularity toward the rights of black people and

to guaranty them equal rights to all citizens, regardless of race or previous condition of servitude. The Courts have construed this Act to apply to blacks asserting job discrimination and employment, based upon race. *Dobbs House, Inc. v. Sanders,* 431 F.2d 1097 (5th Cir.), cert. den'd., 401 U.S. 948, 28 L.Ed.2d 231.

However, the undersigned has been unable to locate a case in which white persons successfully asserted that they were a class within the protection of the Civil Rights Act of 1866. This defendant believes and would urge the Court that there are no such reported cases because the Act was not intended to protect whites, unless possibly such whites were of a particular group or class of whites, either by ethnic or religious differences, in which event conceivably the Act could be said to apply. However, no such particular class of white persons are alleged by plaintiffs nor are plaintiffs shown to be within any such particular class of white persons.

Plaintiffs similarly situated to the white plaintiffs in this case are afforded ample protection and an entirely suitable remedy to pursue any claims of discrimination under the provisions of Title VII, and neither equitable nor moral grounds exist to construe the Civil Rights Act of 1866 beyond its plain language to apply to plaintiffs in this case.

To so hold would clearly give plaintiffs such as those situated in this litigation carte blanche authority to simply ignore the procedural requirements set forth in the Civil Rights Act of 1964 and enable white plaintiffs to merely by-pass, for whatever reason, the Equal Employment Opportunity Commission and the safeguards and remedies afforded under Title VII.

WHEREFORE, premises considered, defendant, The Santa Fe Trail Transportation Company, prays that its Motion to Dismiss be granted, and that it go hence without day.

Respectfully submitted,

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____

Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Prof. Bldg.
P. O. Box 629,
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

DEFENDANT'S, SANTA FE TRAIL TRANSPORTATION COMPANY'S, SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

TO THE HONORABLE COURT:

Defendant, THE SANTA FE TRAIL TRANSPORTATION COMPANY, makes and files this Supplemental Brief, in support of its Motion to Dismiss, and, particularly, to that part of the Motion urging dismissal of plaintiffs' claim under 42 USC Sec. 1981, the Civil Rights Act of 1866, and would show the Court as follows:

I.

In Paragraph III of this Defendant's Brief in Support of its Motion to Dismiss, the undersigned advised the Court that he had been unable to locate a case in which white persons successfully asserted that they were a class within the protection of the Civil Rights Act of 1866. However, attached hereto, and marked Exhibit A and by reference thereto incorporated herein, are the Findings of Fact and Conclusions of Law in Civil Action No. 72-235, styled "Paul D. Barbour, et al vs. Railway Express Agency, et al", in the United States District Court for the Northern District of Alabama, Southern Division, in which said Court squarely held that white persons cannot claim the protection of Sec. 1981 of 42 USC.

So far as is known to the undersigned, this is the only case on the question and same squarely supports this Defendant's Motion to Dismiss.

Respectfully submitted,

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____

Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Professional Building
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481
Attorneys for Defendant, The Santa Fe Trail Transportation Company

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EXHIBIT A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 72-235

PAUL D. BARBOUR, ET AL,
Plaintiffs,

v.

RAILWAY EXPRESS AGENCY, ET AL,
Defendants.

* * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

* * *

HONORABLE SAM C. POINTER, JR.: The Court will now enter its findings of fact and conclusions of law into the record. These are based on the testimony that has been presented in open Court through witnesses together with the documentary evidence that has been offered and received into evidence. This documentary evidence consists in part of interrogatories to the corporate defendant and its answers thereto, and certain requests for admissions of the corporate defendant and its responses thereto. This case has been brought by three white employees of REA under Title VII of the Civil Rights Act. Initially the action was brought also under Section 1981 of Title 42, United States Code, but the Court previously indicated its conclusion that that section could not be

utilized by white persons. Title VII, however, is available not only for blacks who have been discriminated against in their employment, but also in favor of whites who have been discriminated against because of race in their employment. The case is brought against REA Express, Inc., the employer, and against the union which I have previously described in detail, which need not be repeated here, as to its formal title. There are admissions by pleadings that the company and the union do constitute an employer and labor organization within the province of Title VII. This case presents an unusual situation, and I would have to say a rather difficult one for the Court. It is a close question, as I view it. In the 1930's, 1940's, the company and the union had a collective bargaining agreement covering various terminals of the company around the country. These provided for seniority rights in classified jobs for employees, based upon the date that employee successfully bid upon a permanent vacancy or a permanent job. By practice and custom in the South, at least in Birmingham, Alabama, terminal, black employees of REA were not permitted to hold or bid on these jobs back in the thirties and forties and fifties. There was instead a particular job of freight handler which black employees filled. That job, contrary to the collective bargaining agreement, was not posted or in the terminology in this case bulletined as a filling of a permanent vacancy. Instead black employees would simply work that position without gaining any seniority and having only a type of seniority, one as against another, by virtue of the respective dates of their first hire by the company. The other jobs of the company were handled on a bulletined basis or bid basis with employees if not filled by other employees already having permanent jobs bidding on those positions in accordance with their original hire date. If successful

in the bid, then they would obtain a seniority date equal to the award date essentially of their successful bid. The job received for black employees, the Court finds from the evidence to have been less desirable in terms of pay and involving to some degree additional physical efforts over and above those required in the white jobs. In short, the job of freight handler must be considered by the Court as a less desirable position in the employment of the company. This system continued at the Birmingham terminal until 1955 where following the lead made at two other terminals of defendant in the southeastern United States and following the results of litigation that reached the Fifth Circuit for which certiorari was even requested of the Supreme Court, there was a change made in the system in that now blacks were permitted to hold regular or permanent positions and to bid upon those and there became necessary for a decision to be made as to what senority date these black employees would be given insofar as their future service with the company was concerned. The decision was made between the company and the union after negotiations that a date be arrived at for black employees which roughly approximated the estimated date that these black employees would have been awarded the job of freight handler, had that job in the previous years been treated as a regular position. The basis for doing this was to first ascertain when the black employees had been regularly employed by the company. The standard used was that of looking at a sixty calendar day period, and if the black employee had in effect been working full time which apparently was something on the order of six days a week of normal number of hours a day for that approximately two month period of time, then it was assumed, for purposes of this analysis, this retrospective analysis, that the employee had been permanently

employed, and that there was a permanent position opened back at that time. There then was added as to all but two employees a fifteen day period, that being the period that would have elapsed had the collective bargaining agreement provision been followed and the bids process followed. This then was placed as a seniority—a recalculated senority date for these black employees. For the most part dates calculated in this manner for the black employees were earlier than the actual seniority dates which white employees who had been hired initially by the company at the same time had in fact been obtained under the contract. The situation of the individual plaintiffs in this case is relatively typical for other white employees similarly situated in that a period of some four years elapsed for two of the plaintiffs before they were able to successfully bid a permanent job from the date of their original employment, and for another only a period of one year was required. Of course, these are subject to fluctuations depending upon the particular circumstances, the time the employee was hired, and the subsequent vacancies and business terms. The white employees made complaints following the 1955 consolidation in opening of jobs to blacks, that they were being unfairly treated in that blacks now were obtaining seniority dates ahead of them when they had first been hired earlier than comparable blacks. This dispute simmered over a number of years, was not corrected in the bargaining process. It finally found its way into the federal court here via Title VII which provides for equal employment opportunities for white and black. The complaint was made to the EEOC by the named plaintiffs. There was no resolution of the complaint satisfactory to the named plaintiffs, and following that report the plaintiffs brought this instant

action under Title VII. Title VII involves essentially two types of protection. Stated another way it may be violated in either of two ways in the typical case. No. One, there may be employment practice that discriminates against someone actively on the basis of his race, color and the like. Secondly, an employee practice though neutral on its face may nevertheless taken in conjunction with past circumstances be found to be perpetuating the effect of some past discrimination that took place prior to July, 1965, the effective date of the Civil Rights Act. This Court must look at both aspects of Title VII in the present case. I first turn to the question of whether there is some employment practice that perpetuates the effects of past discrimination, that is, pre-1965 discrimination. It stands without significant dispute that there was discrimination in the past during the time when there were white jobs and black jobs. The question is, do the practices now in force perpetuate the effects of that past discrimination which in and of itself was rectified in 1955. The plaintiffs ask that this Court rule that they were discriminated against back in the thirties and forties in that they were unable to obtain the handler of the unloader jobs and were accordingly unable to get some work when there were blacks getting work. The Court, however, has already concluded that this particular job, the black job was less desirable or inferior to the jobs that were reserved solely for whites. Was there discrimination in the past? One interpretation of discrimination is any different treatment. I do not believe that that is the essence of Title VII. I do not believe one can complain under Title VII of discrimination unless it is discrimination adverse to himself. I do not believe he can complain as to discrimination that is favorable to himself. While there may have been some negative features of the pre-

1955 system as relates to whites, I find that those who were discriminated against prior to '55 were blacks and not whites, and accordingly at this stage in time there is nothing which these plaintiffs or their class can complain of that some past discrimination against them is being perpetuated. But now I turn to the question whether the present system presently discriminates against them. A review of the 1972 senority roster, paying attention to those employees who were hired in 1942, leads to this conclusion. If the service date or the first hire date were utilized for seniority purposes, blacks hired during that period of time and still shown on the roster of '72 would in each instance lose a relative position on their senority roster from a minimum of four places to a maximum of fifteen places with most of them losing in the ten to fifteen place range. At the same time whites, for the most part, would have gained places as the blacks dropped back. The result is that the failure to use a first hired date statistically favors black employees in this period. Stated another way, the use of the service date or first hired date to determine seniority would statistically favor whites as compared with our present system. Another way of viewing that is to say that the present system which attempts to use a permanent job time basis statstically favors black employees and statistically discriminates against white employees. That which the plaintiffs would have this Court order would discriminate statistically in the same way that that which they complain about discriminates statistically against the other race. The Court cannot draw a conclusion based on statistics of this sort because either method statistically will show a discrimination. Is there and has there been an attempt or an intent to discriminate based on color? I find and conclude that what the company and union did in 1955 was to attempt

to find a basis on which to treat whites and blacks equally by coming to a basis of when was their permanent job obtained. There is nothing sacred or magic about using a first hire or first pay rather than a first permanent job as the basis on which to measure seniority. One has as much value as the other in a theatrical sense. If there is—have been errors in the application of that, the errors are unintentional or have been unintentional and are not shown to be racially significant. It is possible that there are some blacks on the seniority list who have been given seniority dates at their estimated permanent job date, which is earlier or later than in fact what—when they would have gotten their permanent job had the collective bargaining agreement been honored in the thirties and forties. Likewise it's possible that white employees who had four years to wait before getting a permanent job may have been passed over, that is, may have failed to bid on a job as soon as they possibly could have, may have been out of town when some vacancy was posted. It's possible that some of them may have worked sixty days or over a sixty day period, five days or six days a week, eight hours a day. There is no indication from this evidence that that has happened, but I cannot say that it didn't happen either. But I find that neither the company nor the union intended such results, and that the system arrived at was intended to place all on the same basis. I find no hint that if this had been unfairly done and in an individual case back in 1955 that the local lodge which at that time was segregated would have refused to file a grievance on behalf of that individual who thought he had been denied his appropriate permanent job date. It's a very close question, as I have indicated. I nevertheless conclude and find that there has not been discrimination by the company and union in

this case, and that judgment accordingly should be rendered for the defendants in the case. That is the decision of the Court.

* * *

CERTIFICATE

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, Thomas E. Dempsey, Official Court Reporter of the United States District Court, Birmingham, Alabama, do hereby certify that I reported in stenotypy the foregoing Findings of Fact and Conclusions of Law; that I later reduced my stenotypy notes to typewriting under my supervision, and the foregoing pages contain a full, true and correct transcript of the proceedings as herein set out.

I further certify that I am neither of counsel nor of kin to any parties to said cause, nor in any manner interested in the result thereof.

_____
Official Court Reporter

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

PLAINTIFF'S MOTION AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S SANTA FE TRAIL TRANSPORTATION COMPANY'S MOTION TO DISMISS AND BRIEF IN SUPPORT

TO THE HONORABLE COURT:

COMES NOW, your Plaintiffs, L. N. McDonald and Raymond Laird and file this their Motion and Memorandum In opposition to DEFENDANT SANTA FE TRAIL TRANSPORTATION COMPANY'S MOTION TO DISMISS, previously filed herein and, who would respectfully show the Court the following, to-wit:

I.

JURISDICTIONAL BASIS FOR BRINGING SUIT.

Plaintiffs filed this suit pursuant to Rule 23 (b) of the Federal Rules Of Civil Procedure; 28 U.S.C.; sec. 1343 (4): 42 U.S.C. 2000e, et. seq.; 28 U.S.C. sec. 2201 and 2202 and 42 U.S.C. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Further jurisdiction is invoked pursuant to 29 U.S.C., secs. 151, et seq., based on fair representation owed to Plaintiffs and the class they represents.

II.

PREREQUISITES TO BRINGING A CLASS ACTION UNDER RULE 23(b).

Title VII of the Civil Rights Act of 1964, as amended, specifically provides for the bringing of suits as a class action, under Rule 23(b) of the Federal Rules Of Civil Procedure. Since, under Title VII, discrimination is by definition class discrimination. Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (C.A.-8; 1970).

The purpose of a class action or suits, is to enable the Courts to determine finally the rights of a numerous class of individuals by one common final judgment, rendering separate actions unnecessary. *Kainz v. Anheuser-Busch*, Inc., 194 F.2d 737.9

Subdivision (a) of Rule 23 provides that one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will adequately protect the interests of the class.

Subdivision (b) provides that an action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class. . .

(2) the party has acted or refused to act on grounds generally applicable to the class. . . .

Being in the nature of an action in equity, as opposed to an action in law, it is necessary to give a liberal construction of Rule 23, *See Weeks v. Bareco Oil Company*, 125 F.2d 84. The Rule is procedural, not a limitation on the Court's jurisdiction. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909.

In disposing of the Motion to Dismiss in Parham v. Southwestern Bell Telephone Company the Court pointed out that, "In passing upon the motion the Court is required to view the case in the light most favorable to the Plaintiff, and the motion must be denied unless the Court is convinced beyond a reasonable doubt that the case does not present a genuine issue as to a material fact and that defendant is entitled to a judgment as a matter of law." Citing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A.

Plaintiffs seek relief not only for the class, but individually, as well, therefore "It is clear, then, that to dismiss summarily the injunction and class action aspects of the case would be but a partial disposition of the matter and would be of little real benefit to the defendant, certainly it would not save the Court much, if anything, in the way of time or judicial effort.

In such circumstances summary judgment is simply not appropriate. . . . *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, C.A.-8; 1970).

III.

The only jurisdictional requirement necessary and mandatory on Plaintiff is that he be issued a "RIGHT TO SUE LETTER" by the Commission and that Plaintiff institute suit within the period proscribed by law. The suit must be filed within 30-days of receipt of the right to sue letter. Plaintiffs filed suit within 30 days after receipt of the "30 Day Letter."

IV.

CONCLUSION.

Plaintiffs moves the Court for an Order dismissing the Defendant's Motion to Dismiss and that this matter now pending before this Honorable Court be in all things expedited.

WHEREFORE PREMISES CONSIDERED, Plaintiffs L. N. McDonald and Raymond Laird, respectfully moves the Court to dismiss Defendant's Motion to Dismiss.

By: JAMES BULLOCK
James Bullock
Attorney at Law
4719 Dowling Street
Houston, Texas 77004
(713) 528-4949
Attorney for Plaintiffs

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND ORDER

The plaintiffs, both Caucasian, allege that they and a Negro were charged jointly and severally with misappropriating company property for which the plaintiffs were discharged but the Negro employee was not. It is alleged that the discharges were for racially discriminatory reasons. Defendant Santa Fe Trail Transportation Company (Santa Fe), the employer, and defendant Teamsters Local Union No. 988, of which only plaintiff McDonald is a member, have raised a variety of apparently valid defenses to federal jurisdiction based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* However, jurisdiction based upon the Civil Rights Act of 1866, 42 U.S.C. § 1981, if proper, would bypass those defenses.

Defendant Santa Fe cites only *Barbour v. Railway Express Agency*, ____ F. Supp. ____ (Civil Action No. 72-235, N.D. Ala., filed Nov. 16, 1973) for the proposition that white persons may not bring an action under § 1981. The plaintiffs oppose the motion to dismiss without citing authority. Without conducting a thorough search, this Court has noted several cases in which jurisdiction was held to be proper. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969) [§ 1982];*Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified on appeal*, 450 F.2d 1227 (8th Cir. 1971); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969). The U.S. Supreme Court has held that white persons have standing to sue under § 810(d) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(d), although expressly reserving the question of standing under § 1982, also a provision of the Civil Rights Act of 1866. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 34 L.Ed.2d 415, 419 § n. 8, 93 S.Ct. 364 (1972). Because this point has received inadequate briefing by the parties, the motions to dismiss for lack of jurisdiction will be denied at this time. They may be reurged during or following a trial on the merits, thus allowing additional time for suitable briefing.

This Court is also concerned with whether the complaint states a claim upon which relief can be granted. Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed. 2d 688, 93 S.Ct. 1817 (1973). Assuming, arguendo, that the plaintiffs were discharged because they were white while an equally guilty Negro employee was retained because of his race, this Court still questions whether the plaintiffs have stated a claim. (This Court assumes for present purposes that the Negro employee had a similar work record and similar degree of culpability in the offense.) This point has received inadequate attention in the pleadings filed by the parties and has not been briefed.

For the above reasons, the motions to dismiss must be denied at this time. This case will proceed to trial before the Honorable Peter T. Fay upon the assumption that jurisdiction lies; if the facts indicate no cause of action should lie, the case may be dismissed and the issue of jurisdiction will become moot. If the facts suggest that relief is warranted, then the Court may determine whether it has jurisdiction to award such relief.

DONE at Houston, Texas, this 4th day of January, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

DEFENDANT'S, SANTA FE TRAIL TRANSPORTATION COMPANY'S, SECOND MOTION TO DISMISS

TO THE HONORABLE COURT:

Comes now THE SANTA FE TRAIL TRANSPORTATION COMPANY, one of the Defendants in the above entitled and numbered cause, and makes and files this its Second Motion to Dismiss respective Plaintiffs' above entitled action against Defendant, THE SANTA FE TRAIL TRANSPORTATION COMPANY and as grounds therefor, would respectfully show the Court as follows:

I.

This Defendant has heretofore filed a Motion to Dismiss, which is by reference thereto incorporated herein for all purposes.

II.

In response to such Motion to Dismiss, the Court entered its Memorandum and Order dated January 4, 1974 which appeared to acknowledged the validity of defenses of federal jurisdiction based upon Title VII of the Civil Rights Act of 1964, but not granting the Motion because of the Court's feeling that additional briefing should be

required before the Court rules on whether or not it has jurisdiction under the cause of action alleged by the white Plaintiffs under 42 U.S.C. Section 1981.

III.

Since the Court's Memorandum and Order, Defendant has become aware of rather definitive cases on the question of the application of 42 U.S.C. Section 1981 to white Plaintiffs, therefore files herewith its Supplemental Memorandum of Authorities, and re-urges its Motion that Plaintiffs' action against this Defendant be dismissed for want of jurisdiction and this Defendant go hence without delay.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____
Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Prof. Bldg.
P. O. Box 629,
Galveston, Texas 77550
Tele. No. AC-713, 763-2481
Attorneys for Defendant,
The Santa Fe Trail Transportation Company

NOTICE OF MOTION

TO: MR. JAMES BULLOCK, 4719 Dowling Street, Houston, Texas 77004, Attorney for Plaintiffs; and MR. JAMES P. WOLF, Dixie, Wolf & Hall, Suite 401, 609 Fannin Street, Houston, Texas 77002, Attorneys for Defendant, Local Union No. 988:

Please take notice that the undersigned will bring the above and foregoing Motion on for hearing on Monday, April 29, 1974, or as soon thereafter as counsel may be heard.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____
Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Prof. Bldg.
P. O. Box 629,
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

(Title Omitted in Printing)

DEFENDANT'S, SANTA FE TRAIL TRANSPORTATION COMPANY'S, SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

TO THE HONORABLE COURT:

Defendant, THE SANTA FE TRAIL TRANSPORTATION COMPANY, makes and files this its Second Supplemental Brief, in support of its Motion to Dismiss, and particularly, to that part of the Motion urging dismissal of Plaintiffs' claim under 42 U.S.C. Section 1981, the Civil Rights Act of 1866, and would show the Court as follows:

I.

Defendant would by reference thereto incorporate herein Defendant's Brief in Support of its Motion to Dismiss and Supplemental Brief in Support of its Motion to Dismiss heretofore filed herein.

II.

Since the Court's entry of its Memorandum and Order on January 4, 1974, Defendant has done additional briefing, and feels the substance of the cases cited hereafter warrant the Court's again considering its Motion to Dismiss.

III.

Defendant has heretofore pointed out to the Court the decision in *Paul D. Barbour, et al v. Railway Express Agency, et al.*

IV.

The United States Supreme Court in *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 34 L.Ed.2d 415 (1972), although having an opportunity to speak on whether or not white persons have standing to sue under 42 U.S.C. Section 1981, expressly reserved the question. The only Court of Appeals' opinion found by the undersigned squarely in point is *Perkins v. Banster*, 190 F. Supp. 98 (D.C., Maryland, 1960), affirmed in 285 Fed. 2d 426 (4th Cir., 1960). That Court stated, "Section 1981 is the equal rights section given to non-white persons the same rights which are enjoyed by white persons. Since the Plaintiff . . . is a white person, Section 1981 serves as no basis for jurisdiction in this case." 190 F. Supp. 99.

V.

Two recent District Court decisions rather well consider the precise question in point here. The Court in Ripp v. Dobbs House, Inc. 366 F. Supp. 205 (D.C., Alabama, 1973) considered a civil rights action filed by a white plaintiff under Title VII and 42 U.S.C. Section 1981 complaining of an illegal discharge by his employer by reason of his association and social attitudes toward his fellow employees who were members of the black race and further alleging that the employer maintained employment practices and policies which operated to discriminate against the employment opportunities of blacks.

With regard to the application of Section 1981, the Court on Page 211 said:

> "The Plaintiff seeks to utilize this statute, which is not available to "white citizens", to support this Court's jurisdiction to hear his freedom of association claims. The Court will decline Plaintiff's invitation to extend this statute beyond its reach. Even in its resurrected state, Civil Rights Act of 1866 has been generally limited to its unequivocal terms (citing *Perkins v. Banster,* supra).
>
> "Attempts to expand Section 1981 beyond its terms are generally met with failure. (See cases cited). In summary, the Court concludes that a white plaintiff cannot rely upon 42 U.S.C. Section 1981 to press claims with respect to his private employment."

VI.

The United States District Court for the Northern District of California in *Van Hoomissen v. EEOC, Intervenors v. Xerox Corporation* 368 F. Supp. 829 (1973) rather extensively considers the standing of a white plaintiff to sue his employer under Section 1981. The Court points out that in certain instances whites have been permitted to bring action under Sections 1981 and 1982, but further points out that all of such causes of action were based upon infringement upon the white plaintiff's property rights. The Court at Page 839 further on the basis of private job discrimination states:

> "The Ninth Circuit in *Trafficante v. Metropolitan Life Insurance Co.,* 446 F.2d 1158 (9th Cir. 1971) approved this line of cases by positing a general thesis that, when a white person suffers some "racially motivated interference with his property rights", he has standing to sue under Section 1982. When the *Trafficante* decision was appealed to the Supreme

> Court, the Court in a footnote expressly reserved any ruling on the question of standing under Section 1982 (409 U.S. 205, at 209, n. 8, 93 S.Ct. 364, 34 L.Ed. 415 at 419, n. 8 (1973).
>
> If a white person has standing to sue under Section 1982 when he suffers interference to his property rights due to racially motivated conduct (the Trafficante formula), should that right be expanded to include the companion statute, Section 1981, when a plaintiff suffers a direct injury to his employment as a result of racially motivated conduct? Most Courts have refused to so expand the concept (see text and citations above at page 838 and, as noted above, in the two cases which have allowed white persons standing under 1981, that standing was really predicated upon the interference by defendants with plaintiffs' property rights, not with their employment.
>
> Therefore, as a result of the analysis supra, this Court does not believe it should expand the *Trafficante* formula to allow plaintiff standing under Section 1981. The Supreme Court's refusal to review the *Trafficante* holding on this point indicates to this Court that the matter should be left in status quo until further word from the Supreme Court is heard on this most difficult issue. Thus the Court holds that plaintiff, a white male, has no standing to sue under Section 1981, and that Count Two must be stricken from the complaint."

In *Gannon v. Action,* 303 F. Supp. 1240 (Eastern District, Missouri, 1969) modified on appeal, 450 F.2d 1227 (8th Cir., 1971), the District Court granted members of the congregation of a predominantly white Church an injunction against Black Militants who were disturbing their church service stating:

> "It is clear that (Section 1981 applied) to racial discrimination against all persons regardless of race."

However, on appeal it was held that jurisdiction rested solely upon Section 1985(3). The Court of Appeals specifically declined to determine whether or not it had jurisdiction under Section 1981.

The Plaintiff's action in *Walker v. Pointer,* 304 F. Supp. 56 (Northern District of Texas, 1969) was brought and decided under Section 1982, relating to rights in real property and rentals, and is consistent with other holdings pertaining to the right of white plaintiffs in regard to property rights. Although the Court in *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 894 (Eastern District, Missouri, 1969) in speaking of Sections 1981-1985 indicated its feeling of unfairness to deprive white Americans of the benefit of those Sections, the Court specifically held that Section 1981 applied to white persons who were the victims of racial discrimination against whites insofar as the right to "security of persons and property" (303 F. Supp. 901) were concerned. The Court did not hold that Section 1981 was applicable to whites in area of rights in contract for employment.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.

By: _____
Benjamin R. Powel
Attorney in Charge
808 Sealy & Smith Prof. Bldg.
P. O. Box 629,
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

(Filed May 2, 1974)

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall,
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of caucasians to bring suit under 42 U.S.C.

§ 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point, most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23(c)(1).

With regard to plaintiffs' allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiffs, that charges filed before the EEOC pertained only to the employer, defendant Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where there is a "critical involvement of the collec-

tive bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of a union under Fed. R. Civ. P. 20(a) is proper solely for limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____ F. Supp. ____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critcal involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and that charges were filed with the EEOC by plaintiff McDonald, allegedly on behalf of both plaintiffs, on April 26, 1971. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they were notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that the nature

of notice given upon termination of grievance proceedings would govern this Court's jurisdiction; this is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claims that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursuing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. *See, e.g., Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of authority, the Court concludes for present purposes

that jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

DONE at Houston, Texas, this 2nd day of May, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

FINAL JUDGMENT

BE IT REMEMBERED that on this date the Court issued a Memorandum and Opinion wherein it concluded that this cause of action should be dismissed for the reasons stated therein.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this case should be and hereby is dismissed with prejudice.

This is a FINAL JUDGMENT.

The Clerk shall enter this Judgment and provide counsel with true copies.

DONE at Houston, Texas, this 2nd day of May, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Title Omitted in Printing)

COMBINED NOTICE OF AND MOTION TO CORRECT AND CLARIFY MEMORANDUM AND OPINION ACCOMPANYING FINAL JUDGMENT HEREIN OF MAY 2, 1974

TO: MR. JAMES BULLOCK, Attorney for the Plaintiffs
4719 Dowling Street
Houston, Texas 77004.

PLEASE TAKE NOTICE that the undersigned will move this Honorable Court at the Courtroom in the Federal Building at 515 Rusk Avenue, Houston, Texas, on the 27th day of May, 1974, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an Order correcting and clarifying a certain portion of the Memorandum and Order entered by the Court on May 2, 1974, on the grounds hereinafter set out.

Defendant Union will seek such Order from the Court on the basis:

1. Paragraph 3 of the Court's Memorandum and Opinion being the second paragraph on page 2 of said Memorandum and Opinion, finds on the basis of the pleadings before the Court that the Plaintiffs herein failed to file charges with the EEOC against Defendant Union and their Title VII cause of action was dismissed for want of jurisdiction.

2. These findings were based upon allegations by Defendant Union which were unchallenged by Plaintiffs; however, the facts are incorrect as to Plaintiff L. N. McDonald. Upon rechecking with the Equal Employment Opportunity Commission office in Houston, Texas, it has been determined that a charge against Local Union No. 988 was filed by L. N. McDonald on the 26th day of April, 1971, the same day on which he filed a charge against the Company. No charge was filed by Raymond Laird against the Union. A copy of McDonald's charge is attached to this Motion as EXHIBIT A. The undersigned certifies to the Court that this copy of the affidavit was received from the Equal Employment Opportunity Commission under the representation that it was the only charge which Plaintiff had filed against Local Union No. 988 in this matter.

3. With regard to Plaintiff McDonald's allegations against Defendant Local No. 988, the fourth paragraph of the Court's Memorandum and Opinion, being the last paragraph on page 2 dismisses Plaintiff's Title VII law suit against Defendat Santa Fe because the Plaintiff's failure to comply with the ninety (90) day jurisdictional requirement of 42 U.S.C. § 2000e-5(d). Since it is apparent that the same jurisdictional requirements apply to both Defendant Employer and Defendant Union and the charges against each by McDonald were filed on April 26, 1971, this paragraph should be amended to include Defendant Local Union with Defendant Santa Fe Trail Transportation insofar as the dismissal of Plaintiff McDonald's Title VII allegations.

4. At the time of the filing of Defendant Local No. 988's Answer, Defendant Union had been informed by the EEOC that no charges had been filed against it by

either Plaintiff Laird or McDonald. The charge of McDonald was discovered only upon re-inquiry subsequent to further discussion on this point with Plaintiffs' attorney.

WHEREFORE, premises considered, Defendants move the Court for an order amending its Memorandum and Opinion of May 2, 1974, as set forth above.

Respectfully submitted,

/s/ JAMES P. WOLF
James P. Wolf
Attorney in Charge

OF COUNSEL

DIXIE, WOLF & HALL
Suite 401, 609 Fannin Street
Houston, Texas 77002
713/223-4444
Attorneys for Defendant
Local Union No. 988

(Certificate of Service Omitted in Printing)

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

(PLEASE PRINT OR TYPE)

Case File No. TCHE-1921

SS# 424-28-7473

1 Your Name (Mr., Mrs., Miss) (indicate) L.N. MCDONALD Phone Number 923-5453

Street Address 301 BRYAN

City HOUSTON State TEX. Zip Code 77011

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☒ Religious Creed ☐ National Origin ☐ Sex ☐ CAUCASIAN

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name International Brotherhood of Teamsters Local No. 988

Street address 626 E. 4½ Street PH: 713/869-4826

City Houston State Tex. Zip Code 77007

AND (other parties if any)

4 Have you filed this charge with a state or local government agency? Yes ☐ When ____ (MONTH) ____ (DAY) ____ (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒

6 The most recent date on which this discrimination took place: Month April . Day 7 Year 1971

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I believe that the International Brotherhood of Teamsters Local No. 988 discriminated against me because of my race Anglo-Caucasian by failing to represent me properly,and diligently process my grievance filed with th Union on or about September 26, 1970. During all of this period I made diligent efforts to find the disposition of my grievance. On April 3, 1971, I was informed by my union President that the Union will not proceed to arbitration with my grievance.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 4-26-71 L N McDonald (Sign your name)

Subscribed and sworn to before me this 26th day of April, 1971

Leon Mills Equal Employment Officer (Name) (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APP.: BUR. OF BUDGET—No. 124-R0031 FORM EEOC-5 (REV. 7-63)

EXHIBIT A

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
and INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas, for
defendant The Santa Fe Trail Transportation Co.

James P. Wolf, Dixie, Wolf & Hall, Houston,
Texas, for defendant International
Brotherhood of Teamsters Local No. 988.

MODIFIED MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of Caucasians to bring suit under 42 U.S.C. § 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973);

Ripp v. Dobbs Houses, Inc., 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23 (c)(1).

With regard to plaintiff Laird's allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiff, that charges filed before the EEOC pertained only to the employer, defendant Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where there is a "critical involvement of the collective bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of a union under Fed. R. Civ. P. 20(a) is proper solely for

limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____ F. Supp. ____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critical involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and that charges were filed with the EEOC by plaintiff McDonald against defendant Santa Fe Trail Transportation Company and Local No. 988, on or about April 26, 1971, allegedly on behalf of both plaintiffs. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local No. 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that the nature of notice given upon termination of grievance proceedings would govern

this Court's jurisdiction; that is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claims that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursuing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq*. However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of authority, the Court concludes for present purposes that jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

ENTERED at Houston, Texas, this 13th day of June, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
and INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

(Filed June 13, 1974)

FINAL JUDGMENT

On May 2, 1974, this Court issued a Memorandum and Opinion and Final Judgment. By letter of May 15, 1974, counsel for Local No. 988 advised the Court that, contrary to appearances in the record, an EEOC charge had in fact been filed against Local No. 988. This Court is issuing this date a Modified Memorandum and Opinion making appropriate corrections. As correctly noted by counsel, these charges are primarily academic in light of the Court's holding. Therefore,

BE IT REMEMBERED that on this date the Court issued a Modified Memorandum and Opinion wherein it concluded that this cause of action should be dismissed for the reasons stated therein.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that this case should be and hereby is dismissed with prejudice.

This is a FINAL JUDGMENT.

The Clerk will enter this Judgment and provide counsel with true copies.

ENTERED at Houston, Texas, this 13th day of June, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

L. N. McDONALD and Raymond Laird,
Plaintiffs-Appellants,

v.

The SANTA FE TRAIL TRANSPORTATION COMPANY et al., Defendants-Appellees.

NO. 74-2813.

United States Court of Appeals,
Fifth Circuit.

May 21, 1975.

Action was brought by discharged white employees claiming violation of their civil rights. The United States District Court for the Southern District of Texas, at Houston, Carl O. Bue, Jr., J., entered judgment against the discharged employees who appealed. The Court of Appeals held that statute giving all persons the same right to equal benefit of laws as is enjoyed by white persons confers no actionable rights upon white persons, and that discharge for misappropriation of company property, a charge not alleged to be false, while not dismissing similarly charged black employee did not provide a claim upon which relief could be granted under the equal employment opportunity provisions.

Affirmed.

* * *

James Bullock, Houston Tex., for plaintiffs-appellants.

Benjamin R. Powel, Robert W. Alexander, Galveston, Tex., for Santa Fe Trail Transp.

James P. Wolf, Houston, Tex., for Local 988.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

[1] 42 U.S.C.A. § 1981 gives all persons within the jurisdiction of the United States the same right to equal benefit of the laws "as is enjoyed by white citizens." The district court held that this section confers no actionable rights upon white persons, and dismissed for lack of jurisdiction the § 1981 claim brought by the two white plaintiffs. We affirm. Perkins v. Banster, 190 F. Supp. 98 (D.Md.), aff'd, 285 F.2d 426 (4th Cir. 1960); Kurylas v. U. S. Department of Agriculture, 373 F. Supp. 1072 (D.D.C. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D.Cal. 1973); Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205 (N.D.Ala. 1973); *Contra,* WRMA Broadcasting Co. v. Hawthorne, 365 F. Supp. 577 (M.D. Ala. 1973); Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D.Mo.1969).

[2] We likewise agree with the district court's conclusion that an employer's dismissal of white employees

charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C.A. § 2000e et seq. There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Cf.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939); Nix v. NLRB, 418 F.2d 1001, 1006 (5th Cir. 1969); AHI Machine Tool & Die, Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970).

Affirmed.

Supreme Court, U. S.
FILED
OCT 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners
v.
SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF SANTA FE TRAIL TRANSPORTATION COMPANY IN OPPOSITION TO PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

McLeod, Alexander, Powel & Apffel, Inc.

Benjamin R. Powel
808 Sealy & Smith Professional Building
200 University Boulevard
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent, Santa Fe Trail Transportation Company

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF SANTA FE TRAIL TRANSPORTATION COMPANY IN OPPOSITION TO PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This Brief in opposition to the granting of a Writ of Certiorari is filed on behalf of the Santa Fe Trail Transportation Company (erroneously referred to in the Petition for a Writ of Certiorari as "Santa Fe Transportation Company").

STATEMENT OF THE CASE

This Respondent supplements and corrects Petitioners' Statement of the Case as follows:

As evidenced by the Docket Sheet (App. _____), this action was dismissed after more than two and a half years of pretrial activity, including Motions to Dismiss, the taking and filing of Interrogatories and depositions, and pretrial.

The Trial Court found that the pleading of the plaintiffs did not allege that they were falsely charged with misappropriating company property and that the substance of plaintiffs' allegations is that the plaintiffs take issue with the fact that they were discharged for misappropriating company property while a similarly charged negro employee was not discharged (App to Petition, pg. 28).

In Petitioners' Statement of the Case, they attempt to urge denial of McDonald to the charge of misappropriating company property by pointing to an exhibit attached to the Original Answer of Defendant, National Brotherhood of Teamsters Local No. 988 (App to Petition, pg. 49). This assertion was, however, not made by plaintiffs in their own pleadings before the Court, nor was any denial of misappropriating company property asserted to either the Trial Court or to the Court of Appeals in Petitioners' Brief.

Both the Trial Court and the Court of Appeals found as fact that "there is no allegation that plaintiffs were falsely charged". *McDonald v. Santa Fe Trail Transportation Co.*, 513 F.2d 90 (1975).

In considering the pleadings, the Motions, the Brief, discovery, argument of counsel and the record as a whole,

the Trial Court properly concluded that the allegation of dismissal of white employees who had misappropriated company property without a dismissal of a negro employee similarly charged does not plead a claim of racial discrimination under Title VII (App, to Petition, pg. 28). This finding was adopted by the Court of Appeals for the Fifth Circuit. McDonald v. Santa Fe Trail Transportation Co., supra.

Petitioners' statement that they were never afforded an opportunity by the District Court to offer evidence is just not true, in that the Court had before it the pleadings, Motions, Briefs, arguments of counsel (who is not Petitioners' counsel on appeal) and the record as a whole, to make its factual determination.

Petitioners make no complaint of the District Court's conclusion that the action could not be maintained as a class action, since the number of white persons who may be terminated upon charges of misappropriating company property does not satisfy the numerousity requirements of Rule 23 (App. to Petition, pg. 25). No such complaint was made to the Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

1. A WRIT SHOULD NOT ISSUE MERELY TO ACCORD PETITIONERS ANOTHER HEARING ON THEIR COMPLAINT OF THE PROCEDURAL HANDLING AND FACTUAL FINDINGS OF THE TRIAL COURT.

Petitioners complain of the findings of fact of the Trial Court and urge that they were not afforded an opportunity to offer evidence. As pointed out in the Statement of the Case, Petitioners' case was before the Trial Court for

more than two and a half years, with abundant pleadings, Motions, Briefs, discovery, argument of counsel and the record as a whole, which the Trial Court had for consideration.

The Trial Court, under authority of FRCP Rule 12(b), was authorized to consider only the pleadings or, in the alternative, to consider matters outside of the pleadings, treating the Motion as one for Summary Judgment under FRCP 56, in arriving at its determination that the white plaintiffs had failed to present a claim under Title VII, wherein their dishonesty was not denied, and their basis of racial discrimination was in the comparative severity of disciplinary action.

Petitioners had ample and reasonable opportunities to present all materials pertaining to the various Motions to Dismiss considered by the Trial Court, which were numerous. In January, 1974, the Trial Court denied the Motions to Dismiss, without prejudice to their being reurged (Petitioners' App, pg. 34). The employers submitted additional Motions to Dismiss on April 22, 1974, and Petitioners file absolutely no oppositions thereto prior to the Court's hearing and considering the Motions (App, pg. _____). The matter was re-opened on May 22, 1974, in response to a Motion to Correct and Clarify the Memorandum and Order filed by the Union (App, pg. _____), and Final Judgment was not entered by the Trial Court until June 13, 1974 (App, pg. ____).

2. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT.

(a) *Title VII.* The holding of the Court of Civil Appeals for the Fifth Circuit is not contrary to any of the decisions of this Honorable Court. The thrust of

Petitioners' argument is directed toward the Court's decision in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 3rd L.Ed.2d 668 (1973).

This Honorable Court's holding in the *Green* case, supra, is substantially distinguishable not only on the facts but on the application of the law to those facts. The Trial Court, in *Green,* supra, erroneously focused its attention on the retaliatory provision of Title VII (2000e-3(a)) and refused to consider, and in fact allowed no evidence on, plaintiff's claim under 2000e-2(a)(1). *Green* involved a case where an employer allegedly discriminated in refusing to rehire a former employee, admittedly qualified for an available job, by reason of his previous activities while not an employee, which consisted of obstructing roadways to the employer's plant and participating in chaining shut doors of a building in which employees of McDonnell Douglas Corp. were employed. The activity of obstructing traffic was apparently a misdemeanor, to which Green pled guilty.

In the instant case, McDonald, a driver, and Laird, a night supervisor, were charged with theft of property from the employer, while in the company's employ, which action, after a general investigation, resulted in their dismissal by the company.

Theft of company property over a value of $200.00 is a felony under the Texas Penal Code, Article 31.03, Vernon's Texas Codes Annotated - Penal.

The dismissal of these two (2) white employees on its face was a result of and immediately following the theft of company property and, on its face, was directly related to the ability of these two (2) employees to perform their jobs. These employees are respectively a truck driver

for a truck transportation company entrusted with the goods and commodities of others for transportation and a dock foreman or superintendent having supervisory duties obviously including the safe transportation, accounting for and handling of goods and commodities of his employer's customers.

Green's situation was entirely dissimilar. Green was a black man, a member of an obvious minority group, was obviously qualified for the job for which he applied and, under the facts of the *Green* case, supra, it was obvious that the employer may have seized upon Green's previous civil rights activities as a pretext for refusing to hire him, though he was qualified.

This Honorable Court, in the *Green* case, supra, noted that the employee, to establish a prima facie case, must show (1) that he belongs to a minority race; (2) that he is qualified for the job in question; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the job remained open or that the employer continued to seek applications from persons of complainant's qualifications. While this Honorable Court, in its Opinion, pointed out that these facts may not necessarily apply to each Title VII case, the Court's statements of the elements of a prima facie case are at least instructive.

These criterion applied to the case at hand show, first, that petitioners are not members of a minority race; and, secondly, how can petitioners argue that they are qualified to continue to be entrusted with the goods and commodities handled by the employer transportation company, when the facts of theft are apparent and not denied by the petitioners. Accordingly, the allegations of disparity in disciplinary action by the employer, involving a claim of equal complicity by three (3) employees in an episode

of theft from the employer's property, isolated to complain of disparity in discipline between two (2) white employees in comparison to a negro employee involved in the affair, not only fails to state a cause of action, but certainly cannot be construed to be contrary to the holding of this Honorable Court in *McDonnell Douglas Corp. v. Green*, supra.

(b) *Section 1981*. The decision of the Court of Appeals is not contrary to any decisions of this Honorable Court on the question of whether or not a white employee has a cause of action for alleged racial discrimination in employment under 42 USC, Section 1981, and is consistent with this Court's decision on 42 USC, Section 1982, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235 (1969).

In *Sullivan*, the Court held that a white person, alleging punishment for vindicating the rights of minorities, has standing to sue under Section 1982. In the instant case, no claim is made that petitioners were dismissed for vindicating the rights of others.

3. THERE IS NO CONFLICT IN THE DECISIONS AMONG THE CIRCUITS.

(a) *Title VII*. Petitioners have presented no cases indicating any conflict in Courts of Appeals' decisions with the decision of the Court of Appeals for the Fifth Circuit below in the instant case.

(b) *Section 1981*. There are Circuit Courts' Opinions involving claims of white litigants, alleging discrimination by reason of the white litigants' activities in attempting to vindicate the rights of "non-Caucasians", which have followed this Honorable Court's recognition of standing of

such white litigants under 42 USC Section 1982, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235 (1969). See *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306 (2d Cir. 1975). However, in the instant case, no claim is made that plaintiffs were dismissed for attempting to vindicate the rights of others.

Where white persons have sued under Section 1981 solely on the grounds of racial discrimination in such white persons' own employment, Section 1981 was considered by the 4th Circuit Court of Appeals, in *Perkins v. Banster*, 190 F.Supp. 98, affirmed 285 F.2d 426, to be unavailable to white litigants in such situation as the basis for relief.

The 8th Circuit, in *Action v. Gannon*, 450 F.2d 1227 (1971), in a conspiracy to discriminate case under 42 USC Section 1895(3), specifically declined to affirm the lower Court's finding of jurisdiction under 42 USC Section 1981, 303 F.Supp. 1240 (E.D. Mo. 1969).

Accordingly, while the question of standing of white litigants to sue for redress, where alleging discrimination in their own employment, is still being developed in a myriad of conflicting fact situations in the District Courts, no differences in the Circuit Courts' Opinions are presented.

CONCLUSION

Respondent submits that this case presents a poor vehicle for consideration of the scope of statutory regulation of employment conditions. It involves the theft by the complaining, disgruntled white employees of property in the care of employees charged with the responsibility for its care and protection. The white employees, disgruntled by

the stern application of discipline by the employer, have seized upon this isolated incident to complain because an involved black employee was less severely disciplined.

Civil rights activities by the petitioners is in no way involved. The discharge of culpable employees in connection with the theft of property in the care and custody of the employer transportation company is a directly responsive job-related action. No hint of discriminatory practices or politics against whites is presented.

Petitioners have shown no conflict between the decision in this case and this Honorable Court's decisions on the standing of whites seeking remedies private to them.

Petitioners also seek the granting of a Writ for the purpose of having the Court extend the application of Section 1981 relief to white persons who are members of the overwhelming majority in this country, and provide yet another judicial vehicle for actions by whites to pursue private employment rights against employers.

This area of law is still developing in the District Courts below. While the time may come when the Circuits are in such disagreement that this Honorable Court should point the direction, such time has not come, especially in view of the factual posture of white employees charged with the crime of theft, which strikes at the employer transportation company's very reason for being—the safe movement of goods for its customers.

Giving white employees the right to challenge the comparative severity of discipline assessed because of felonious crimes directed at the employer, completely unrelated to civil rights activities under Section 1981, would not serve to assure equal employment opportunities, but to make

every discipline assessed white employees subject to litigation and review by the federal judiciary.

For these reasons, the Writ of Certiorari should be denied.

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL, INC.

BENJAMIN R. POWEL
808 Sealy & Smith Professional Building
200 University Boulevard
P. O. Box 629
Galveston, Texas 77550
Tele. No. AC-713, 763-2481

Attorneys for Respondent, Santa Fe Trail Transportation Company

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 1975, three (3) copies of the foregoing Brief of Santa Fe Trail Transportation Company in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Messrs. Stuart M. Nelkin, Henry M. Rosenblum and Robert B. O'Keefe, 4635 Southwest Freeway, Suite 320 West, Houston, Teas 77027, and to Messrs. James P. Wolf and Chris Dixie, Suite 401, 609 Fannin Street, Houston, Texas 77002, who are all parties required to be served.

BENJAMIN R. POWEL

APPENDIX A

CLOSED 5-2-74
JS 6 made pt

71-H-891

CIVIL DOCKET
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
C. Form No. 106A Rev. Houston Division

Jury demand date:

CARL O. BUE, JR

TITLE OF CASE	ATTORNEYS
L. N. McDONALD & RAYMOND LAIRD VS THE SANTA FE TRAIL TRANSPORTATION CO. AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988	For plaintiff: ~~ISAAC E. HENDERSON~~ ~~711 Main Building~~ ~~Houston, Texas 77002 pd pdu~~ ~~2619 Blodgett 521-9555~~ James Bullock 4719 Dowling Houston, Texas 77004 529-4701 For defendant: Sante Fe Trail Trans.- McLeod, Alexander, Powel & Apffel (Robert W. Alexander) P.O.Box 629 Galveston, Texas 77550 International Union No. 988- James P. Wolf DIXIE, WOLF & HALL 609 Fannin St. Bldg., #401 Houston, Texas 77002 223-4444

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
. 5 mailed	Clerk		5/16/74	I E H	15 00	
			5/20/74	Q3 1-5		15 00
. 6 mailed	Marshal		5/24/74	J. Bullock Not. of Appeal	$5.00	
is of Action: Civil Rights, Junctive Relief, Preliminary Permanent Injunction	Docket fee		6-3-74	C.D. 1-35		5 00
	Witness fees					
tion arose at:	Depositions					

71-H-891

CARD 0. 1

DATE	PROCEEDINGS	Date Or Judgmer
9/16/71	Original Complaint filed in Duplicate	1.
9/16/71	Summons issued on Santa Fe Transportation Company	
9/15/71	Summons on Santa Fe Ret. & filed. Ex. 9/9/71	2.
9-30-71	Defendant the Santa Fe Trail Transportation Company's motion to dismiss filed in duplicate (M /D 10-11-71)	3 11
9-30-71	Defendant the Santa Fe Trail Transportation Company's brief in support of its motion to dismiss filed in duplicate	4 12
10/14/71	Plaintiff's Reply to Defendant's Motion to Dismiss, filed.	5. 13
11/15/71	Summons issued on International Brotherhood of Teamsters Local, No. 988	
12/6/71	Summons returned, executed on 11-17-71 on International Brotherhood of Teamsters Local No. 988, filed.	6.
12-7-71	ANSWER of Local Union No. 988, filed.	7 7
3/7/72	Plaintiff's Motion for Leave to File Amended Complaint, filed.	8. 7
3/7/72	Plaintiffs' First Amended Complaint filed in Duplicate.	9.3
4/11/72	Answers of the Santa Fe Trail Transportation Co. to Plaintiffs' Interrogatories, filed.	10.3
4/24/72	Plaintiff's Interrogatories to Deft. Santa Fe Trail Transportation Co., filed.	11.4
9-10-73	Motion (Isaac E. Henderson) to withdraw filed	12 4
9-11-73	(COB) PRE-TRIAL held.	
9-11-73	(COB) "The motion of Issac E. Henderson to withdraw as one of the counsel of record representing plaintiffs is GRANTED. . ."	41-A
7/19/73	Plaintiff's Second AMENDED COMPLAINT, filed.	13.4
7/25/73	Deft. Teamsters Local Union No. 988's Combined Notice of and MOTION to Dismiss, M/D 8/13/73.	14.5
7/25/73	Deft. Teamsters Local Union No. 988's BRIEF in Support of its Motion to Dismiss, filed.	15.6
7/25/73	Deft. Local Union No.988's FIRST AMENDED ANSWER, filed.	16.4
1-28-73	ORIGINAL ANSWER of Deft. The Santa Fe Trail Transportation Co., filed.	17 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s MOTION TO DISMISS, filed. M/D: 12-24-73 by Clerk	18 7
1-28-73	Deft. The Santa Fe Trail Transportation Co.'s BRIEF in Support of Its Motion to Dismiss, filed.	19 8
2- 3-73	Amended Certificate of Service to Deft.'s The Santa Fe Trail Transportation Co.'s Motion to Dismiss, Brief in Support of Its Motion to Dismiss and Original Answer, filed.	20 8
2- 7-73	(COB) MEMORANDUM & ORDER, signed & filed. Pltf. directed to submit opposition to deft. Teamsters' Motion to Dismiss as well as Deft. Santa Fe's Motion to Dismiss no later than 12-24-73, or case will be dismissed for want of prosecution. (parties ntfd by c/c,rlo)	21 8
2-12-73	Deft. Santa Fe Trail Transportation Co.'s Supplemental BRIEF in Support of Its Motion to Dismiss, filed.	22 9
2-26-73	Pltf.'s Motion and MEMORANDUM in Opposition to Deft.'s Santa Fe Trail Transportation Co.'s Motion to Dismiss and Brief in Support, filed.	23 10

CA 71-H-891 Carl O. Bue, Jr.

Page #2

D. C. 110A Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Judge
1- 4-74	(COB) MEMORANDUM AND ORDER, signed & filed, Defts. Teamsters Local Union No. 988 and Santa Fe Trail Transportation Co.'s MOTIONS to Dismiss DENIED. Parties ntfd. by c/c. pt	10 24
1- 4-74	Deft. Santa Fe Trail Trans. MOTION FOR CONTINUANCE, filed.	25
1- 7-74	(COB) ORDER granting Motion of Santa Fe Trail Trsp. Co. for Continuance and re-setting case for trial at 10:00 am. May 3, 1974, signed & filed. (parties notified by c/c,rlo	26 111
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND MOTION TO DISMISS, filed. M/D: 4-29-74	27
4-22-74	Deft. Santa Fe Trail Transportation Co.'s SECOND SUPPLEMENTAL BRIEF in Support of Its Motion to Dismiss, filed.	28 114
5- 2-74	(COB) MEMORANDUM AND OPINION, signed & filed, Deft. Santa Fe Trail Transportation Co.'s Motion to Dismiss for lack of jurisdiction GRANTED; Court concludes action may not be maintained as a class action; action dismissed as to Deft. International Brotherhood of Teamsters Local No. 988 for want of jurisdiction; Court dismissed action w/prej. Parties ntfd. pt	29 117
5- 2-74	(COB) FINAL JUDGMENT, signed & filed, cause dismissed w/prej. Parties ntfd. by copy. pt	30 12
5- 9-74	DEPOSITIONS of the following, filed:	124
	Charles Adrian Jackson	31
	L. N. McDonald	32
	Donald Howard Stratton	33
	Fred Osburn, Jr.	34
	Raymond Laird	35
5-22-74	Deft. Motion to Correct and Clarify Memorandum and Opinion accompanying Final Judgment herein of 5-2-74, filed.	36 12
5-24-74	Plffs' Notice of Appeal, filed.	37
6-13-74	(COB) MODIFIED MEMORANDUM & OPINION, filed. No proper basis for Title VII relief found and action against Deft. IBT # 988 dismissed for want of jurisdiction; further consideration as to deft. Santa Fe Trail Trsp. Co.-no claim upon which Title VII relief can be granted. This case dismissed with prejudice. Parties notified by copy.	38 131
6-13-74	(COB) FINAL JUDGMENT, filed. Case dismissed w/prejudice in line with its Memorandum & Opinion of even date. Parties notified by copy. rlo	39 134

Supreme Court, U. S.
FILED
SEP 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF LOCAL UNION NO. 988 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHRIS DIXIE
Suite 401, 609 Fannin Street
Houston, Texas 77002
713/223-4444

JAMES P. WOLF
Suite 401, 609 Fannin Street
Houston, Texas 77002
713/223-4444
Counsel for Respondent Union

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF OF LOCAL UNION NO. 988 IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This brief in opposition to the granting of a writ of certiorari is filed on behalf of Respondent, Teamsters Freight, Tank Line and Automobile Industry Employees, Local Union No. 988. The other Respondent, Santa Fe Transportation Company, will file its own separate response.

QUESTIONS PRESENTED

1. Whether in administering punishment in a specific episode of theft of an employer's property by three employees, the employer's dismissal of two white employees while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. §§ 2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981.

However, even accepting Petitioner's articulation of the "Questions Presented", Respondent Union advises the Court that the judgment in its favor against Petitioner Laird is adequately based upon other alternative grounds. As a foreman, Petitioner Laird was neither a member of the bargaining unit covered by the collective bargaining contract nor a member of the Union; therefore, no question is raised by him against the Union under either Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, or the Civil Rights Act of 1866, 42 U.S.C. § 1981.

STATEMENT OF THE CASE

This Respondent supplements and corrects Petitioners' Statement of the Case as follows:

Following more than two and one-half years of pretrial activity, including motions to dismiss, pretrial conferences, and discovery proceedings, the District Court concluded that the action could not be maintained as a class action

since the number of white persons who may be terminated upon charges of misappropriating company property does not satisfy the numerosity requirement of Rule 23. (Appendix to Petition, p. 25) This factual determination and consequent legal conclusion was not challenged below.

During this period, the District Court filed three memorandum opinions, on January 4, 1974, May 2, 1974 and June 13, 1974, in which it interpreted Petitioners' pleadings and contentions to be that Petitioners were "equally guilty" of theft of the employer's property in comparison with a Negro employee who was not discharged (Appendix to Petition, p. 36) and that

> "[t]he pleadings of plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged". Appendix to Petition, pp. 33 and 28.

The District Court was also advised by the parties that Petitioner McDonald's discharge was taken to arbitration by the Union where the discharge was upheld, although the Court property declined to accord finality to the arbitration award for Title VII purposes. (Appendix to Petition, pp. 27 and 32; See also Petitioners' Brief in the Court of Appeals, p. 4)[1]

---

1. Petitioners' Brief in the Court of Appeals states at page 4: "On October 2, 1970, L. N. McDonald filed a grievance with Local Union No. 988, and a hearing on the grievance was held before the Southern Area Multi-State Grievance Committee commencing at 9:00 A.M., Monday, October 10, 1970, at the Ramada Inn, West Beach, Biloxi, Mississippi, Case No. 58."

The posture of the case below does not, in this Respondent's view, accommodate the claim of Petitioners that they were not afforded an opportunity by the District Court to offer evidence that they were innocent of the accusations. Petitioners did not by requesting leave to sharpen their pleadings or by any other means advise the District Court or the Court of Appeals that the gravamen of their claim was innocence or that the District Court misunderstood their posture. If they had done so, the Title VII aspect of the case might well have faded away, and the arbitration award would likely have been elevated to a final and binding disposition under the collective bargaining contract, adjudicating as it did the simple question of Petitioner McDonald's guilt or innocence of theft.

In the view of this Respondent, therefore, this appeal comes to the Supreme Court as a case involving a claim of equal complicity by three employees in an episode of theft of an employer's property followed by the employer's imposition of disparate discipline against two white employees in comparison to a Negro employee involved in the affair.

Theft of company property of over $200 is a felony under the Texas Penal Code.[2]

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2. The theft charge involved 10 cases of anti-freeze which Petitioner McDonald was accused of stealing from trailer 20438. McDonald stated in his grievance that a shipping clerk at "S.M.S." told him to do what he like with "some anti-freeze over on trailer 20438," that he so informed Petitioner Laird, "my supervisor," and that Laird told him "what to do with this anti-freeze." See Appendix to Petition, pp. 50-51.

Texas Penal Code Article 31.03, Vernon's Texas Codes Annotated-Penal, provides that theft of property valued at $200 or more is "a felony of the third degree" which is punishable by confinement in the State penitentiary for not less than 2 nor more than 10 years under Article 12.34 of the Penal Code.

REASONS FOR DENYING THE WRIT

1. This case involves an *ad hoc* decision by an employer in dealing with an isolated episode of felony theft by three employees. An employer's sifting of the facts and circumstances surrounding each of the employees and its assessment of the relative culpability and appropriate punishment of each is normally a unique judgment that would rarely be decisive of other cases. This case does not involve any general policy of the employer or the Union. There is no claim that the administration of this case by Respondents is part of a pattern or policy of discharge for theft, either in this company or in industry generally. Fortunately, there could be no serious claim of significant frequency or recurrence of theft on the job in industry generally. Thus, this holding below is of limited significance which does not merit review by this Court.

2. Another peculiarity of the case is the circumstance that Petitioner Laird was a supervisor while the undischarged Negro employee was a nonsupervisory workman and member of the bargaining unit. To what extent is an employer required by Title VII to administer equal discipline for felony theft as between employees of entirely different status, responsibility and trust in the company's administrative organization? At most, the Title VII problem which Petitioner Laird seeks to kindle is highly unusual.

3. Insofar as Petitioner McDonald seeks to emphasize initially in this Court an assertion of innocence, we have here an additional twist that the Union did take the case to arbitration before the contractual Multi-State Grievance Committee which sustained the employer's discharge of

this employee. The federal policy favoring the settlement of labor disputes through arbitration and the federal policy against employment discrimination combine to permit an employee to pursue fully both arbitration and his cause of action under Title VII, *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) but Respondent suggests that this option to pursue both remedies does not obtain if the employee's claim is purely a matter of guilt or innocence of theft and the arbitration decision has been adverse to him. In the latter case, the adverse arbitration award is binding. If the claim of innocence as distinguished from the claim of discriminatory discipline had been seriously urged in the District Court, Petitioner McDonald might well have found himself barred by the finality of the arbitration award.

4. The imposition of equal punishment to all participants in a particular episode of felony theft of an employer's property is not a requirement of Title VII. The intention of Congress was to remove "artificial, arbitrary and unreasonable barriers to employment", *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 806 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431. Selective punishment of employees involved in a particular episode of felony theft of company property is not part and parcel of "discriminatory practices or devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *Griggs v. Duke Power Co., supra*, 401 U.S. at 429. In *McDonnell Douglas Corporation v. Green, supra*, this Court declared that

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate unlawful activity against it", 401 U.S. at 803.

The Court also made clear that the principles of *N.L.R.B. v. Fansteel Corp.*, 306 U.S. 240 (1939), are pertinent to a Title VII action. In *Fansteel*, the Court set aside an N.L.R.B. reinstatement of sit-down strikers even though the strike was an unfair labor practice strike which had resulted from "reprehensible" illegal employer conduct and even though the employer there did not discharge other sit-down strikers of equal guilt. Because of the severe misconduct involved in *Fansteel*, the Court honored the right of the employer to discharge some while retaining others. 306 U.S. at 259.

In this case, the Court of Appeals, noting that there was no allegation that Petitioners were "falsely" charged with misappropriating company property, affirmed *per curiam*, holding that "disciplinary action for offenses not constituting crimes is not involved in this case." (Appendix to Petition, pp. 22-23) It thus applied the *McDonnell* and *Fansteel* decisions by excluding from Title VII this very limited but very appropriate situation. It excluded only "disciplinary action" in a particular episode of the crime of theft committed against an employer.

In this connection, it should be noted that the case, as a theft case, is even more removed from the area of statutory regulation of employment conditions than *McDonnell* and *Fansteel*. In those cases the employees' unlawful conduct was motivated by high principle and unselfish objective, related to hire and conditions of employment, although it was excessively militant. Here, the case is ugly, serious theft. It would not promote the valued purposes of Title VII to put federal courts into factual re-examination of the discipline imposed in each particular episode of theft. On the other hand, if disparity should later arise from the development of widespread

practices or rules concerning the administration of discipline in theft cases, which practices or rules seem to work disproportionately or unfairly against any race, then this Court will, no doubt, grant appropriate review to consider the competing social values in the situation.

5. As to 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, there has been no deviation from the principles already established by this Court under the companion 42 U.S.C. § 1982.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 235, 237 (1969), a white property owner was held to have standing under 42 U.S.C. § 1982 to sue for the redress of damages inflicted upon him because of his effort to uphold the right of a Negro to rent and enjoy the white person's property in an all-white neighborhood. The same holding was made earlier in a restrictive covenant case under the Fourteenth Amendment in *Barrow v. Jackson*, 346 U.S. 249, 259 (1953). In both cases this Court upheld the standing of white litigants to vindicate the rights of others—"non-Caucasians" in *Barrow v. Jackson, supra*, 346 U.S. at 259-260, and "minorities protected by § 1982" in *Sullivan v. Little Hunting Park, supra*, 396 U.S. at 237.[3]

These contours of standing under 42 U.S.C. § 1982 were followed by the Second Circuit in *De Matteis v.*

3. In a § 1982 case somewhat more removed from direct vindication of the rights of black persons by a white, this Court expressly reserved ruling. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205, 209 n. 8 (1973). There the Ninth Circuit held a white and a black person who were not themselves deprived of the right to rent or purchase property had no standing under § 1982 to sue on account of a landlord's policy of excluding black persons from a housing project thereby depriving plaintiffs of the benefit of living in an integrated community. 466 F.2d 1158 (9th Cir. 1972)

Eastman Kodak Co., 511 F.2d 206, 311-312 (2nd Cir. 1975) and the cause of action was upheld under § 1981 where plaintiff was forced into premature retirement by his employer, Kodak, because he sold his house, located in a neighborhood inhabited primarily by white Kodak employees, to a black fellow-employee.

But where white persons have sued under § 1981 solely for the vindication of their own rights, the statute has been held unavailable. *Perkins v. Banster*, 190 F.Supp. 98 (D. Md.), aff'd, 285 F.2d 426 (4th Cir. 1960). The Eighth Circuit pointedly declined to affirm a contrary holding in *Gannon v. Action*, 450 F.2d 1227 (8th Cir. 1971) affirming in part and remanding in part, 303 F. Supp. 1240 (E.D. Mo. 1969).

The opinion below is in accord with this Court's holdings under § 1982 and with the holdings of the Second, Fourth and Eighth Circuits under § 1981. There is no lack of unanimity in the Courts of Appeals.

Petitioner's plea for parallel liberal treatment of §§ 1981 and 1982 is not apropos. Petitioner's real objective is to obtain new and enlarged application of § 1981 (and presumably § 1982) to protect the rights of white persons against black persons, a difficult feat since both sections assure the right of all persons to have the same rights as "white citizens."

The need to strain for this result, if it ever existed in a predominantly white nation, has abated since the passage of Title VII which admittedly does assure equal employment opportunities of all races and ethnic groups and which is available to white persons who deem themselves aggrieved by discriminatory preferences for blacks. Title VII has the advantage of channeling such competing

claims through the Equal Employment Opportunity Commission where, at least, an initial and informed judgment can be made by a qualified agency to establish a proper balance between competing claims of diverse races and ethnic groups. On the other hand, the enlargement of § 1981 as Petitioners suggest, might have the result of encouraging obstructive or dilatory litigation under § 1981 by persons disgruntled by the adverse effect of some of the Title VII remedies now being implemented. At least this prospect deserves consideration before Petitioners' suggestions are accepted.

CONCLUSION

For these reasons, the writ of certiorari should be denied.

Respectfully submitted,

CHRIS DIXIE
Suite 401, 609 Fannin Street
Houston, Texas 77002

JAMES P. WOLF
Suite 401, 609 Fannin Street
Houston, Texas 77002

Counsel for Respondent Union

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, A.D. 1975, three copies of the foregoing Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Messrs. Stuart M. Nelkin, Henry Rosenblum and Robert B. O'Keefe, 4635 Southwest Freeway, Suite 320 West, Houston, Texas 77027, and to Mr. Benjamin R. Powel, 808 Sealy & Smith Professional Building, P. O. Box 629, Galveston, Texas 77550, who are all parties required to be served.

JAMES P. WOLF

Supreme Court, U. S.
FILED
DEC 24 1975
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IN THE

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OCTOBER TERM, 1975

NO. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
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SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

BRIEF ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY M. ROSENBLUM
ROBERT B. O'KEEFE
4635 Southwest Freeway
Suite 320 West
Houston, Texas 77027
(713) 629-0650

Counsel for Petitioners

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals, a copy of which appears in the Appendix at pp. 120-122, is reported at 513 F.2d 90. The opinions rendered by the United States District Court for the Southern District of Texas are unreported and appear in the Appendix at pp. 113-117 and pp. 118-119.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1975, and this petition for certiorari was filed August 18, 1975, and granted on November 3, 1975. __U.S.__ (1975) The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§2000e-2(a)(1) Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

United States Code, Title 42

§1981 Equal Rights under the law—

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

QUESTIONS PRESENTED

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. §1981.

STATEMENT OF THE CASE

On September 26, 1970, Petitioners, who are white, were accused by the Respondent The Santa Fe Trail Transportation Company of having misappropriated certain of the Respondent's property. A black employee was similarly accused. On October 2, 1970, following an alleged investigation by the Respondent, the Petitioners were terminated but the black employee was not.

On October 8, 1970, Petitioner McDonald initiated a grievance in which the charges of misappropriation were emphatically denied.[1] On April 3, 1971, Petitioner McDonald was notified that his discharge had been sustained and that his grievance would not be further pursued by the Union Respondent.

On April 26, 1971, Petitioner McDonald filed Charges of Discrimination with the Equal Employment Opportunity Commission in which he charged that his race had been a factor in the employment decision of Respondents to discharge him.

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1. App. pp. 19-20.

On August 16, 1971, Petitioners initiated this action in the United States District Court for the Southern District of Texas, Houston Division. Invoking the Court's jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981, Petitioners contended, *inter alia;* that they, along with a similarly situated black employee, had been charged by the Company with misappropriating company property; that subsequent to being so charged by the Company, Petitioners were discharged but the similarly situated black employee was not; that their discharge was without cause; and that they were discharged because of their race. In particular, Petitioners complained that the Company had imposed a more severe disciplinary sanction against them because of their race, Caucasian, and that this constituted a discriminatory preference in derogation those rights secured to Petitioners by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1981. Additionally, Petitioners contended that Respondent Union had acquiesced in the company's racially discriminatory employment decision. Following discovery and certain motion practice, Petitioners filed their Second Amended Complaint on July 19, 1973.[2]

On January 4, 1974, the district court finding that petitioners had "alleged that the discharges were for racially discriminatory reasons", denied motions to dismiss. At issue in the motions were (1) the proposition of whether white persons may bring an action under 42 U.S.C. § 1981,[3] and (2) the proposition that Petitioners who were discharged following their apprehension for the alleged theft of their employer's property, while an

2. App. pp. 4-11 and 35-42.

3 App. pp. 92-93.

equally charged black employee was retained because of his race had not stated a claim under Title VII.[4]

On May 2, 1974, the district court issued a second Memorandum and Opinion in which it held that "[42 U.S.C.] §1981 is inapplicable to white persons"; additionally, the court held "[T]hat the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted".[5]

The district court apparently predicated its decision in part, on the finding that Petitioners had failed to allege that they were falsely charged with misappropriating company property. This finding was adopted by the United States Court of Appeals for the Fifth Circuit.[6] In fact, evidence of each Petitioner's innocence of the charges of misappropriation had been squarely presented to the district court, see n. 37, *infra*.

On appeal to the United States Court of Appeals for the Fifth Circuit the panel held, *per curiam*, that 42 U.S.C. §1981 "confers no actionable rights upon white persons," and "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. §§2000e *et seq.*"[7]

4. App. p. 94.

5. App. pp. 103-108.

6. "There is no allegation that Plaintiffs were falsely charged." App. p. 122.

7. App. pp. 121-122.

Petitioners were never afforded an opportunity by the district court to offer evidence that (1) they were innocent of the accusations, or that (2) the not-discharged black employee was equally culpable, and that (3) race was a factor considered by Respondent Company in its decision to discharge Petitioners while retaining the similarly charged black employee.

SUMMARY OF ARGUMENT

It was the intent of Congress by the Civil Rights Act of 1964, to provide equal employment opportunities for all persons regardless of race and to condemn discriminatory preferences for either minority or majority employees. This Court has so held. *Griggs v. Duke Power Company*, 401 U.S. 424 (197). While an employer may justifiably discharge one who has engaged in unlawful conduct against it, Title VII requires that this criterion be applied alike to members of all races. This Court has so held. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). When an employee alleges that he has been the victim of discriminatory disciplinary treatment, he must be afforded a fair opportunity to show that the employer's action was pretextual or discriminatory in its application. This Court has so held. *Id.* at 807.

It was the clear intent of Congress by enacting the Civil Rights Act of 1866 to confer the rights, privileges and immunities contained therein upon whites as well as blacks. *Hollander v. Sears, Roebuck & Company*, 392 F. Supp. 90 (D. Conn. 1975); Cong. Globe, 39th Cong. 1st Sess. 599 (1866). A careful analysis of decisions of this Court and the better reasoned opinions of the lower courts supports this proposition.

Allowing whites standing to redress invidious, non-remediating discrimination under Title VII and 42 U.S.C. §1981 will not interfere with the salutory purposes of affirmative action.

Reversal, with directions that a trial on the merits be conducted under both Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. §1981 is required.

ARGUMENT

I.

DISMISSAL OF WHITE EMPLOYEES CHARGED WITH MISAPPROPRIATING COMPANY PROPERTY WHILE NOT DISMISSING A SIMILARLY CHARGED BLACK EMPLOYEE RAISES A CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §§2000e, ET SEQ.

Prompted by this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and the growing civil rights movement, Congress began to enact comprehensive legislation designed to promote *practical* racial equality. In particular, Congress enacted Title VII of the Civil Rights Act of 1964,[8] to assure equality of employment opportunities for *all* persons. This coalescence of congressional, judicial and social pressure has in turn propelled our society into a social transformation, the end result of which must be true racial equality, not merely the hollow promise of equality in law, but racial equality in fact.

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8. Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103, now 42 U.S.C. § 2000e, *et seq.*

Yet, as might be expected in any rapid social change, this metamorphasis has not been without unintended consequences.

Now, for the first time, this Court is being confronted with white persons seeking to invoke the protection of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866,[9] alleging that they were the victims of a racially discriminatory employment decision; to date their efforts have been thwarted.[10] Congress did not intend such a result.

A. The Courts Below Clearly Disregarded Congressional Intent and Decisions of This Court in Finding That Petitioners had Failed to State a Claim Under Title VII of the Civil Rights Act of 1964, as Amended, 42 U.S.C. §§2000e, et seq.

Meager specific Congressional guidance[11] is available to assist this Court in resolving *precisely who* is covered by the Civil Rights Act of 1964. It is well settled that blacks,[12] chicanos,[13] and women[14] are embraced by its

9. Act of April 9, 1866, Ch. 31, ¶1, 14 Stat. 27, re-enacted by § 17 of the Enforcement Act of 1870, Act of May 31, 1870, Ch. 114, § 18, 16 Stat. 140, 144 and codified in §§ 1977, 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981, 1982.

10. See, Memorandum and Opinion of the District Court, May 2, 1974, App. pp. 103-107; and the Opinion of the United States Court of Appeals for the Fifth Circuit, App. pp. 120-122.

11. *Espinoza v. Farah Manufacturing Company, Inc.*, 414 U.S. 86, 88 (1973).

12. *Albemarle Paper Company v. Moody*, ____U.S.____, 45 L.Ed.2d 280 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

13. *Espinoza, supra* n. 11.

14. *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

terms. Apparently unresolved to this day is whether Title VII protects not only those who for decades have suffered employment discrimination but also those who are nominally well ensconced in the American economy, the white male.

While few courts have addressed the issue, Petitioners submit that this Court laid to rest all such ambiguity when it announced:

> Discriminatory preference for any group, minority *or majority*, is precisely and only what Congress has proscribed. (emphasis supplied)

Griggs v. Duke Power, 401 U.S. 424, 431 (1971). Accord, *Marquez v. Ford Motor Co.*, 440 F.2d 1157, 1163 (8th Cir. 1971).

The paucity of decisions addressing the issue of the standing of white persons *qua* white persons under Title VII is attributable to the fact that whites have not heretofore suffered,[15] nor are they presently emerging from, decades of employment discrimination. There exist few reported opinions where whites have successfully asserted violations of Title VII.[16] However, most decisions do not

15. One District Court, in *dicta* has found that whites are covered by Title VII and predicted that they will seek its protection.

> ". . . it was passed to help whites as much as blacks if their civil rights are being violated, and this court can foresee where in many situations, now and in the future, that whites will be asking for protection of Title VII of the Civil Rights Act of 1964."

United States v. International Longshoremen's Assoc., 334 F. Supp. 97, 979 (S.D. Tex. 1971) rev'd on other grounds *sub nom., EEOC v. International Longshoremen's Assoc.*, 511 F.2d 273 (5th Cir. 1975), cert. denied ____U.S.____ (No. 75-356, Dec. 2, 1975). Accord. *Ripp v. Dobbs House, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973).

16. See, e.g., *Parks v. Brennan*, 389 F. Supp. 790 (N.D. Ga. 1974) rev'd on other grounds *sub nom. Parks v. Dunlop*, 517 F.2d 785 (5th Cir. 1975).

turn on the question of standing but rather on general findings that the plaintiffs have not been discriminated against because of their race.[17] Implied in each case is that on a showing of racial discrimination relief would have been considered. White plaintiffs have successfully asserted rights paralleling those of Title VII under other provisions of the Civil Rights Act of 1964.[18]

Curiously, the courts below[19] and two other district courts[20] have chosen to ignore this Court's finding in *Griggs, supra,* and have erroneously concluded that white persons lack standing to assert violations of Title VII.

Mr. Justice Douglas had no reservations as to the scope of this Court's holding in *Griggs;* in his dissent from this Court's ruling in *Espinoza, supra,* he stated:

> But whether brown, yellow, *black or white,* the thrust of the act is clear . . . Griggs . . . *extends its*

17. *David F.X. Smith v. John Gunther,* _____F. Supp._____, 9 EPD ¶9915 (D.C. D.C. 1975); *Bellamy v. Mason Stores, Inc.,* 368 F. Supp. 1025 (D.C. Va. 1973). *Cf. Rios v. Enterprise Association of Steamfitters, Local 638,* 520 F.2d 352 (2nd Cir. 1975). The Court indicated that had the whites suffered "reverse discrimination" they would be on sounder footing; *U.S. v. Bethlehem Steel Corporation,* 446 F.2d 652, (2nd Cir. 1971). ". . . there was no proof that Bethlehem rejected any white applicants . . . on the basis of . . . national origin". 446 F.2d at 665; *Phillips v. Columbia Gas of West Virginia, Inc.,* 347 F. Supp. 533 (D.C. W. Va. 1972) aff'd 474 F.2d 342 (4th Cir. 1973).

18. E.g., *Anderson v. San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972). White plaintiffs successfully prosecuted racial discrimination charge pursuant to Title VI, 42 U.S.C. 2000d.

19. See, n. 10, *supra.*

20. *Haber v. Klassen,* _____F. Supp._____, 10 FEP Cases 1446 (N.D. Ohio, 1975); *Mele v. United States Department of Justice,* _____F. Supp._____, 10 EPD ¶10,258 (D.C. N.J. 1975).

> *protective principles to all, not to blacks alone.* (emphasis supplied).

414 U.S. at 97.

Moreover, the Equal Employment Opportunity Commission has expressly recognized the standing of whites to complain of racially motivated job discrimination.[21] Citing *Griggs,* the Commission has held:

> To find that [similar] recruiting methods are violative of Title VII only where Caucasians occupy the favored position (footnote omitted) would constitute a derilection of the Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, *including Caucasians.*[22] (Emphasis supplied).

CCH EEOC Decision No. 74-31 ¶6404 (1973).

While in the majority of instances the Commission has found that there was "no probable cause" to believe that Title VII had been violated,[23] it has never quailed from its duty to condemn racial discrimination directed at

21. As the federal agency charged with enforcing the provisions of Title VII this Court has recognized that their interpretations of the Act are entitled to great deference. *Griggs v. Duke Power Co., supra* at 433.

22. See, CCH EEOC Decision No. 74-95 ¶6432 (1974) n. 4.

23. CCH EEOC Decision No. 75-019 ¶6465 (1975);
CCH EEOC Decision No. 75-274 ¶6454 (1975);
CCH EEOC Decision No. 75-269 ¶6453 (1975);
CCH EEOC Decision No. 75-215 ¶6449 (1975);
CCH EEOC Decision No. 75-040 ¶6440 (1974);
CCH EEOC Decision No. 75-037 ¶6437 (1974);
CCH EEOC Decision No. 74-10 ¶6391 (1973).

whites even when such discrimination is in the name of "affirmative action".[24]

While the Commission's interpretation of the statute is entitled to great deference, that deference is limited if the Commission's interpretation does not conform with clear congressional intent. *Espinoza, supra,* 414 U.S. at 94. However, regarding the applicability of Title VII to white persons, the EEOC's interpretation perfectly mirrors the intent manifested by Congress during its long and arduous debates of the early 1960's.

While Congress did not dwell at length on the matter of the applicability of Title VII to white persons, virtually every time the question was raised, the answer emphasized that the Act prohibits *all* racial discrimination. Responding to the charge that the Act seemed to compel an employer to grant preferential treatment to minorities, Senator Williams remarked:

> Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. *Both forms of discrimination are prohibited by Title VII of this Act.* The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race over another? Equality can have only one

24. CCH EEOC Decision No. 75-268 ¶6452 (1975);
CCH EEOC Decision No. 74-106 ¶6427 (1974);
CCH EEOC Decision No. 74-26 ¶6398 (1973);
See also, *Anderson, supra* n. 18.

> meaning, and that meaning is self-evident to reasonable men.

Legislative History of Titles VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office. 1969 p. 3189.

Again, during floor debate, Congressman Celler,[25] observed with considerable acuity, that the Act applied to whites as well as blacks:[26]

> Mrs. Griffiths: Before I begin my argument, however, I would like to ask the chairman of the Committee on the Judiciary, the gentleman from New York a question.
> Mr. Chairman, is it your judgment that this bill will protect colored men and colored women at the hiring gate equally?
>
> Mr. Celler: This bill is *all-embracing and will cover everybody in the United States.*
>
> Mrs. Griffiths: It will cover every colored man and colored woman?
>
> Mr. Celler: *Yes, it will cover white men and white women and all Americans.*[27] (Emphasis supplied)

Id. at 3217

25. Chairman of the House Committee on the Judiciary.

26. The colloquy developed during House debate on an amendment proposed by Congressman Smith of Virginia to prohibit discrimination based on sex.

27. In further discussions with Mrs. Griffiths, the Congressman refused to waiver:

> Mrs. Griffiths: Could a white woman, turned away from the college or from the restaurant where all the employers were white invoke the act? Would a white woman have any recourse under the Act?
>
> Mr. Celler: I think we covered that in colloquies we had in the earlier part of the afternoon. *There could be discrimina-*

Significantly, Congressman Celler's interpretations were confirmed by Senators Clark and Case in their interpretative memorandum:[28]

> There is no requirement that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. *It must be emphasized that discrimination is prohibited as to any individual.*[29]

Id. at 3040.

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tion against white people and there could be against colored people.

Mrs. Griffiths: Mr. Chairman, you know well and good if every employee of that restaurant were white, that that woman cannot go to the FEPC or to a district attorney and say "I was turned away from there because I was white" because every employee is white there.

Mr. Celler: That is specu'ation. Of course, that may be due to the derelictions of the particular Government agency; and *if there are such cases, there is discrimination, and I think we, as members of Congress, should all complain if it happens. Legislative History of Titles VII and XI of the Civil Rights Act of 1964, supra,* at 3218. (emphasis supplied)

28. Senators Clark and Case were the floor managers for the House bill in the Senate. Their memorandum was introduced into the Congressional record on April 8, 1964.

29. Early in the Senate debate on the House bill, Senator Clark received a number of objections to the bill, one of which is germane to the issue:

> Objection: Many employers will lean over backwards to avoid discrimination against other employees, increasing the case volume.

to which Senator Clark replied, in part:

> In addition, the Commission has a *clear mandate* to engage in widespread educational and promotional activities to encourage understanding of the policy of the Act, *including the obligation not to discriminate against whites.*
>
> *Id.* at 3015

In light of this clear Congressional intent, it cannot be gain-said that the EEOC has given practical effect to Congressional mandate by giving even-handed consideration to the complaints of the majority as well as the minority. The forged intent of Congress and the decisions of the Commission founded on that intent, demand that this Court lay to rest any remaining conflict among the lower courts. Only a compounding of already hopeless confusion can result if this Court fails to squarely address the issue.[30]

Inconsistent notions of the meaning of Title VII among the Judiciary and the Executive will doubtless recur if the case *sub judice* is not remanded. It appears that two different panels of the same Circuit Court of Appeals have arrived at different conclusions regarding the standing of white persons under Title VII.[31]

A number of wrongs have been righted in the decade since Title VII became law. To deny the salubrious aspects

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30. This confusion in the lower courts is best illustrated by *Haber v. Klassen, supra,* n. 20. In *Haber* the District Court erroneously relied on the first of the four "prima facie case" criteria (e.g. that he belongs to a racial minority) in *McDonnell Douglas Corp. v. Green, supra,* and held that,

> "Members of the white race may not seek relief for racial discrimination, under Title VII . . .". *Haber, supra,* 10 FEP Cases at 1447

Haber, the unsuccessful white Title VII plaintiff has Appealed to the United States Court of Appeals for the Sixth Circuit. *Haber v. Klassen*, No. 75-2158. The defendant-appellee, represented by the United States Department of Justice, on October 8, 1975, filed a "Suggestion of Remand" in which it urges that the district court has misconstrued Title VII.

The "Suggestion of Remand" is instructive and is included as Appendix A.

31. Compare, *McDonald v. Santa Fe Trail Transportation Co.*, 513 F.2d 90 (5th Cir. 1975) with *Parks v. Dunlap,* 517 F.2d 785 (5th Cir. 1975).

of the Act to a generation of persons — and their progeny — whose prejudices have only recently been overcome, is not only inconsistent with prior judicial pronouncements of this Court and Congressional intent, it is morally wrong. This Court must unequivocally give Title VII its intended breadth[32]— equality to all people.

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32. While there remains a dearth of case authority dealing with the definitional parameters of the term "race" as used in the Act, the courts below have examined the issue of whether Congress intended to provide males with a cause of action for sex discrimination. *See, e.g., Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, U.S. 950; *Burns v. Rohr Corp.*, 346 F. Supp. 994 (S.D. Cal. 1972). The analogy is useful. In *Diaz, supra*, the Fifth Circuit was faced with the claim of males who were admittedly "locked-out" of certain job classifications because of their sex. In considering whether the job required a female and thus was a bona fide occupational qualification within the meaning of the Title VII, the Court pointed out the underlying basis for finding that both men and women are protected by the Act:

> The Amendment adding the word "sex" to "race, color, religion and national origin" was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, however, it is reasonable to assume, from a reading of the statute itself, that one of Congress' main goals was to provide equal access to the job market for both men and women. Indeed as this Court in *Weeks v. Southern Bell Telephone and Telegraph Co.*, 5 Cir., 408 F.2d 228 at 235 clearly stated, the purpose of the Act was to provide a foundation in law for the principle of nondiscrimination. Construing the statute as embodying such a principle is based on the assumption that Congress sought a formula that would not only achieve the optimum use of our labor resources but, and more importantly, would enable individuals to develop as individuals.

Diaz, supra at 386-387.

As the Fifth Circuit properly construed the term "sex" to encompass both men and women, so this Court must construe "race" to include whites as well as blacks; anything less would mock the concept of racial equality.

B. An Employer's Allegation of Unlawful Conduct does not Obviate the Prescribed Neutrality which must Govern Every Employment Decision.

The touchstone in all Title VII[33] litigation brought pursuant to § 703(a)(1) of the Act is "whether *for any reason,* a racially discriminatory employment decision has been made". *McDonnell-Douglas Corp., supra* at 800. Defining discrimination in its broadest possible terms,[34] "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities". *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied 406 U.S. 957. (1972)

Enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, . . ." *Alexander v. Gardner-Denver Co., supra* 415 U.S. at 41, Title VII prohibits all racial discrimination in every aspect of employment regardless of degree or form. *Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). It operates to negate an employers prerogative to make any rules or decisions which are predicated, in whole or in part, on race.

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33. And, apparently in all 42 U.S.C. § 1981 litigation seeking to redress employment discrimination. *Johnson v. Railway Express Agency*, ____U.S.____, 144 L.Ed.2d 295 (1975).

34. Senators Clark and Case in their interprative memorandum analyzed the concept of discrimination:

> To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by § 704 are those which are based on . . . race . . .

Legislative History of Titles VII and XI of the Civil Rights Act of 1964, supra, at 3040.

See, *McDonnell-Douglas Corp., supra* at 804; *accord, Windsor v. Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975); *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970) cert. denied, *sub nom, Dobbs Houses, Inc., v. Sanders*, 401 U.S. 948 (1971).

EEOC Guidelines require an investigation to determine whether similarly situated employees of different races have received dissimilar treatment because of their race. Critical to the investigation is whether the charged employer has been fair and evenhanded in meting out discipline.[35] See, CCH EEOC Decision No. 75-269 ¶6453 (1975. Federal courts facing claims of racially disparate disciplinary treatment have adopted this criteria, *McRae v. Goddard College* ____ F. Supp. ____ 10 FEP Cases 143, 149 (D.C. Vt. 1975); and the employer's decision to terminate an employee whether for inefficiency, *Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974); *Alexander v. Gardner-Denver Co., on remand*, 8 FEP 1153, aff'd 519 F.2d 503 (10th Cir., 1975), or for violating company rules, *Martin v. Chrysler Corporation*, ____F. Supp.____ 10 FEP Cases 329 (E.D. Mich. 1974), becomes limited by the "dissimilar treatment" test.[36]

In finding that Petitioners had failed to state a claim the lower courts relied heavily on the erroneous finding that Petitioners had not denied the allegations of theft.[37]

35. BNA Labor Relations Reporter, *Fair Employment Practices Manual*, The Bureau of National Affairs, Inc., § 421:102 (1975).

36. See, e.g., *Freeman v. Xerox Corp.*, 49 A.D. 2d 21 (S.Ct. N.Y. 1975); Accord, *Windsor v. Bethesda General Hospital*, 523 F.2d 891 (8th Cir. 1975).

37. Both the court of appeals and the district court found that

Assuming *arguendo* that Petitioners had not denied the allegations of theft as the lower courts concluded, they were nonetheless entitled to make out their *prima facie* case of discrimination by showing at trial, *inter alia*,[38] that a similarly charged black employee had not been discharged.[39] "Petitioner may justifiably refuse to [rehire] one who was engaged in unlawful, disruptive acts against it, but *only* if this criterion is applied alike to members of all races", *McDonnell-Douglas, supra,* at 804.

The reasoning of the court below is fallacious insofar as it relies on this Court's holding in *McDonnell-Douglas Corp., supra.*[40] to support its decision. There, the Court

Petitioners' pleadings did not allege that they were falsely charged. See, App. p. 122 and p. 117.

While admittedly inartfully drawn, Petitioners' Complaint charged that they "were discharged by Defendant Santa Fe Trail Transport Company *without cause* . . .". See, App. p. 38. The Complaint was a verified pleading, thus any reasons advanced by the Respondent for Petitioners discharges were necessarily refuted *ab initio*.

Petitioners McDonald expressly denied the charges in a grievance submitted to the district court by Respondent Local 988.

> "These [C]harges are wrong and are unjust, because I did not steel [sic] anything . . ."

App. p. 19.

It is not even clear that Petitioner Laird was discharged for allegedly unlawful conduct. In its verified answers to interrogatories, Respondent Santa Fe submitted:

> "Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules." App. p. 32.

38. Petitioners were not afforded an opportunity to demonstrate their innocence. The action was dismissed pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

39. No criminal charges were ever filed against Petitioners.

40. The court below also relied on certain cases arising under the National Labor Relations Act. 29 U.S.C. § 151, *et seq. NLRB v. Fansteel Metalurgical Corp.*, 306 U.S. 290 (1939); *Nix v. NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969); *AHI Machine Tool & Die,*

stated: "Disciplinary action for offenses not constituting crimes is not involved in this case." App. p. 122. The court's reliance was misplaced. In *McDonnell-Douglas,* the complaining party was a confessed misdemeanant. 411 at 795. He alleged that his failure to be rehired was discriminatory; the Company, as the Respondents here, alleged that the failure to rehire was justified by petitioners unlawful conduct. In *McDonnell-Douglas,* the former employee alleged that Title VII was violated because the Company's refusal to rehire him was pretextual to a discriminatory intent. Here, Petitioners allege that a similarly charged black employee was not discharged[41] in violation of Title VII. A prima facie case of discriminatory application of an employment policy

Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970). These cases are inapposite.

In *Nix, supra,* and *AHI Machine Tool & Die, Inc., supra,* the Courts of Appeals had before them complete records, including witness testimony and Findings of the Trial Examiner; and in both cases relied heavily on the well-developed records in finding that the complained of discharges were not pretextual. Furthermore, and perhaps more importantly, the National Labor Relations Act, grants employees rights to organize and engage in certain concerted activities in order to improve the terms and conditions of their employment; Title VII, on the other hand, is prophylactic in its effect. It neither grants rights to employees nor proscribes their activities; its only function is to require employers to conform their employment practices to the mandates of the Constitution of the United States. See, Legislative History of Titles VII and XI, *supra* at 2009 and 2026. § 703(a)(1) of Title VII is silent as to "protected activities". This Court should not now engraft on to the face of Title VII those restrictions peculiar to the National Labor Relations Act. For, while it is clear that ". . . conduct which is not protected concerted activity may lawfully form the basis for the participants discharge. [*T*]*hat does not mean that the discharge is immune from attack on other statutory grounds in the appropriate case.*" (Emphasis supplied). *Emporium Capwell Co. v. Western Addition Community Organization.* ____U.S.____, 43 L.Ed.2d 12, 29 (1975).

41. See Brief, *supra,* p. 4.

has been alleged; "Especially relevant to such a showing would be evidence that [white] employees involved in acts against petitioner of comparable seriousness. . were nevertheless retained. . .". 411 at 804.

Here, as in *McDonnell-Douglas,* Petitioners were not afforded the opportunity to demonstrate that Title VII had been violated. In the case *sub judice,* the absence of any plenary hearing requires a reversal and a remand, since:

> [Respondent] must be afforded a fair opportunity to demonstrate that [petitioner's] assigned reason for refusing to re-employ was a pretext or *discriminatory in its application.* (Emphasis supplied)

Id. 411 at 807.

In *McDonnell-Douglas* this Court resolved the question of whether a mere allegation by the employer of "unlawful activity" is not conduct that is protected by §703 of Title VII in the negative; the Fifth Circuit's Opinion here draws distinction without a difference. The language of §703 (a)(1) is broad, and embraces every employment decision, Petitioners "should have been accorded the right to prepare [their] case with the knowledge that the §703 (a)(1) cause of action was properly before the District Court." *McDonnell-Douglas, supra* at 800.

The facts present here stand foresquare with those in *McDonnell-Douglas.*[42] For this Court to hold, on these facts, that the mere allegation of criminality by the Respondents would place Petitioners without the zone of

42. Bearing in mind however that Petitioners have never admitted guilt, nor have criminal charges ever been filed against them. See n. 37, *supra.*

"protected activities" would assuredly cause Title VII to collapse into the very evil it seeks to cure. [43]

II.

WHITE EMPLOYEES WHO WERE DISCHARGED FOR ALLEGED MISAPPROPRIATION OF COMPANY PROPERTY WHEN A SIMILARLY CHARGED BLACK EMPLOYEE WAS NOT DISCHARGED HAVE STANDING TO SUE UNDER THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §1981.

This Court is becoming increasingly confronted with scattered occurrences of invidious racial discrimination directed against *white* persons. This relatively new form of racial discrimination has been manifested in a variety of situations. For instance, in some cases, blacks have been found to have interferred with the rights of white persons to hold and use property. *E.g., Gannon v. Action,* 303 F.Supp. 1240 (E.D. Mo. 1969), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971).

Situations have also arisen where white persons, because of their race, have had their rights to contract for employment infringed. *E.g., Hollander v. Sears, Roebuck & Company,* 392 F.Supp. 90 (D. Conn. 1975); and, of course, the fact situation now before the Court is another

43. If the employer is able to avoid the sanctions of Title VII by merely asserting "crime" this would deliver him Carte Blanche authority to engage in wholesale discrimination without fear of administrative or judicial reprisal. Thus, under circumstances where, for example, five blacks and five whites, all involved in the same crime, pleaded guilty to theft from their employer, he could exercise his new license to discriminate by freely discharging all five blacks while retaining all five whites. Clearly, Congress did not intend such a result.

example of racial discrimination against white persons in employment. Racially disparate discipline by an employer for similar or identical alleged employee misconduct gives rise to a cause of action under 42 U.S.C. §1981.[44]

Obviously, there exists a clear need to accord white persons protection against racial discrimination. The legislation necessary to protect white persons when they are the victims of invidious racial discrimination in employment is already in force; all that is needed is an even-handed application of the Civil Rights Act of 1866, 42 U.S.C. §1981. This Court has already held that §1981 provides a cause of action against private racial discrimination. *Johnson v. Railway Express Agency,* ____ U.S.____, 44 L.Ed. 295, 301 (1975). Thus, all that remains is for this Court to fulfill the promise of the Act that *all* men shall be protected from invidious racial discrimination in their exercise of It's enumerated rights.

A. The Language of the Statute Compels the Conclusion that White Persons Have Standing to Sue Under 42 U.S.C. §1981.

The clearest indication that 42 U.S.C. §1981 was intended to protect white persons as well as non-whites is found on the face of the statute itself:

> §1981. Equal rights under the law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of

44. *Windsor v. Bethesda General Hospital,* 523 F.2d 891 (8th Cir. 1975).

> persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[45]

The terms of the statute fairly defy a narrow "blacks only" construction, for with its opening words §1981 declares its protection to "*All* persons within the jurisdiction of the United States". This broad sweeping language necessarily embraces white persons. *Baca v. Butz,* 394 F. Supp. 888, 890 n. 4 (D.C. N. Mex. 1975) Nor is the protection accorded by §1981 restricted to non-whites by the later appearing phrase, "as is enjoyed by white citizens". The phrase is simply an effort to *quantify* the rights to be enjoyed by "all persons". It is merely a convenient measuring stick against which the rights of "all persons" are compared, and does not preclude whites from coverage under §1981 since whites themselves may be denied rights which are normally available to members of their race, *Hollander v. Sears Roebuck & Co.,* 392 F. Supp. 90, 94 (D. Conn. 1975); see, *Baca v. Butz, supra* at 890

45. In its original form, 42 U.S.C. § 1981 was part of § 1 of the Civil Rights Act of 1866, *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422 (1968). That section provided:

> *Be it enacted by the Senate House of Representatives of the United States of America and Congress assembled,* that all persons born in the United States and not subject to any foreign power, * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, to be parties, and give evidence to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as if enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to note other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

n. 3. This is demonstrated by the racially discriminatory discharge to which your Petitioners were subjected by a fellow Caucasian. See Plaintiff's [sic] Second Amended Complaint, App. pp. 35-42.

The plain purpose of §1981 is to provide for equality of rights as between persons of different races, *Georgia v. Rachel,* 384 U.S. 780, 791 (1966); *Agnew v. City of Compton,* 239 F.2d 226, 230 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957). To construe this phrase so as to deny white persons the protection of §1981 would be to give the statute a construction in contravention of the clear intent of the statute to end invidious racial distinctions.

In fact, the phrase "as is enjoyed by white citizens", far from being of substantive importance, was regarded by Congress as superfulous language, the omission of which would in no way alter the substance of the statute. *See,* Cong. Globe, 39th Cong., 1st Sess. 1412 (1866), (Remarks of Senator Trumbull). The phrase was added by the House only "to emphasize the racial character of the rights being protected" *Georgia v. Rachel, supra* at 791; and as such was merely cosmetic. Clearly, therefore, the protection extended to all persons, and thus to all races, in the first nine words of the statute remains unqualified by the phrase "as is enjoyed by white citizens".

B. The Legislative History of the Civil Rights Act of 1866, Reveals That 42 U.S.C. §1981 was Intended to Protect White Persons as Well as Non-Whites.

Looking beyond the face of the statute, to the legislative history of the Civil Rights Act of 1866, only confirms

that Petitioners have standing to sue under §1981. Granted that the act was passed primarily to aid recently freed slaves, it is nevertheless clear that from its inception the Act was intended by contemporaries to protect white persons as well as blacks. This is initially evident from the fact that the Act was passed to implement the Thirteenth Amendment which itself was intended to benefit whites as well as the Negro. *See, Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment,* 12 Hous. L. Rev. 1, 7-14 (1975) (hereinafter cited as *Buchanan*).

The Act was introduced on January 5, 1866, as a bill "to protect *all persons* in the United States in their civil rights and furnish the means of their vindication" by Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee and a principal draftsman of the Thirteenth Amendment. (emphasis supplied). *Cong. Globe,* 39th Cong., 1st Sess. 129 (1866). Designated as Senate Bill Number 61, the bill was the measure which gained Republican support after several previous attempts at comprehensive civil rights legislation had failed. These unsuccessful proposals are significant inasmuch as they manifest a common concern for securing to all persons equal protection of the law and protecting every person's natural or inalienable rights. They failed, not because of their objectives, but because their scope was too narrow to suit the majority of Republicans who felt the bill did little more than annul bad laws. *Buchanan,* at 15. What the Republicans sought, and eventually found in S. No. 61, was a bill that affirmatively protected for all persons certain enumerated rights. The rights Congress chose to enumerate are enlightening—*i.e.*, the rights to make and enforce contracts, to inherit, purchase, and lease, and,

finally, the right to the full and equal benefit of all laws and proceedings for the security of persons and property. This enumeration reveals that a major thrust of the 1866 Act was equal protection under the law and equality of economic opportunity for black and white persons alike, *Buchanan* at 16.

On January 12, 1866, the Senate began consideration of S. No. 61 as a Committee of the Whole. At that time, Senator Trumbull explained that the bill declared that:

> [T]here shall be no discrimination in civil rights or immunities among inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of *every race and color* [shall have the same enumerated rights]. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 211 (1866).

Again, on January 30, 1966, another proponent of the bill, Senator Jacob M. Howard of Michigan, succinctly stated the purpose of the bill:

> Mr. President, I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights . . . there is to be hereafter no distinction between the white race and the black race.

Cong. Globe, 39th Cong. 1st Sess. 504 (1866).

Quite obviously, to achieve the practical equality envisioned by the supporters of the bill, §1981 must be construed to protect white victims of invidious racial discrimination.

Even the opponents of the bill recognized the color blind nature of S. No. 61. For instance, in the course

of expressing concern over the incursion of the bill into the rights of the states, Senator Reverdy Johnson of Maryland explained the scope of the bill:

> Now, if I understand this bill, *it is not confined to persons of African descent*. The language of the first section is: [quoting]
>
> That is to say, that no state shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, *whether white or black*, on account of color, if they are not white, or on account of their having been previously in a state of slavery, *so that the white as well as the black is included in this first section.* . . . (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 505 (1866).

A clearer pronouncement that the bill was intended to protect white persons is difficult to imagine, unless it can be found in the remarks of Senator Lyman Trumbull, the author of the bill. In response to a "long harangue" from Senator Davis of Kentucky, Senator Trumbull rose to declare unequivocably that white persons were indeed covered by the bill:

> Sir, *this bill applies to white men as well as black men*. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it and when *the very object of the bill is to breakdown all discrimination between black men and white men?* (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 599 (1866).

Without a doubt then, both sides understood that S. No. 61 was intended to protect both white and non-white victims of invidious racial discrimination, and with that understanding, the bill passed the Senate on February 2, 1866 by the substantial margin of 33 yeas to 12 nays. Of course, the above quoted remarks were made before the House added the words "as is enjoyed by white citizens" but an examination of the debates in the House *after* the phrase was added discloses that the House of Representatives, likewise, thoroughly intended white persons to be protected by the bill.

On May 2, 1866, Senate Bill 61 was introduced to the House by Representative James F. Wilson of Iowa, Chairman of the House Judiciary Committee. After offering several committee amendments which were adopted without debate, Mr. Wilson personally offered the amendment which contained the phrase "as is enjoyed by white citizens". In support of the amendment, which was again adopted without discussion, Mr. Wilson simply stated that the change was necessary to perfect the amendment as already offered, Cong. Globe, 39th Cong. 1st Sess. 1115 (1866). During his remarks on the bill immediately following the amendments, Mr. Wilson reaffirmed the theme established in the Senate that the bill was intended to protect the fundamental rights of all men:

> Mr. Speaker, if all our citizens were of one race and one color, we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the State, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and *we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.* (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1118 (1866).

Just over a week after Chairman Wilson made this statement, he yielded some of his floor time to Representative Samuel Shellabarger of Ohio, who said of the bill:

> It secures—not to all citizens, *but to all races* who are citizens—equality of protection in those enumerated civil rights which the states may deem proper to confer upon any races. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1293.

Once again, the protection of white persons being firmly established, the bill was passed—again by an overwhelming vote—211 yeas and 38 nays. *Id.* at 1367. When the civil rights bill was returned for the concurrence of the Senate, the additional, "as is enjoyed by white citizens" verbage was completely discounted as making any change in the classes of persons protected by the bill. The question was raised by Senator Van Winkle of West Virginia:

> MR. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words "and such citizens". As I understand those words, they include all persons who are or can be citizens, *white persons and all others.* The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts," & etc.. "as is enjoyed by white citizens". *It seems to me these words are superflous. The idea is that the rights of all persons shall be equal; I think the clause leaving out these words, would obtain the object.* This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> *MR. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superflous.* I do not think that they alter the bill. I think the bill would have been better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and inserted them; *and as in the opinion of the committee which examined this matter, they did not alter the meaning of the bill,* the committee thought proper to recommend the concurrence, and I hope that the Senate will concur in it.
>
> *MR. VAN WINKLE.* It is a mere verbal correction that I suggested, and I am not at all strenuous about it; nor perhaps should I have made it had I been more aware that the attention of the committee had been called to it. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1413 (1866).

With no other discussion, the Senate concurred in the House's "as is enjoyed by white citizens" amendment. Thus, the clear intendment of the bill, to protect whites as well as non-whites, remained unaltered through the amendatory process of both Houses.

While the civil rights bill enjoyed overwhelming support in Congress, it was not as well received by President Andrew Johnson. The bill was vetoed on May 27, 1866. When the bill was returned to Congress following the veto, proponents of the bill again had occasion to stress the importance and scope of the bill. In the House, Representative William Lawrence of Ohio, who had theretofore refrained from comment on S. No. 61, rose on April 7, 1866, to summarize the bill:

> I will not therefore attempt a full discussion of it now, but content myself with briefly presenting some of the grounds upon which I will again perform the proudest fact of my political life in voting to make this bill the law of the land.
>
> . . .
>
> This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, *is not made for any class or creed, or race or color, but in the great future that awaits us will, if it becomes a law, protect every citizen,* including the millions of people of foreign birth who will flock to our shores to become citizens and to find here a land of liberty and law. (Emphasis supplied)

Cong. Globe, 39th Cong. 1st Sess. 1833 (1866).

Thus, tracing the bill through both Houses conclusively demonstrates the surprising unanimity with which both Houses agreed that the 1866 Act protected white persons

if they were the victims of invidious racial discrimination. Congressman Lawrence's remarks accurately reflected the sentiment of the vast majority of both Houses, for two days later, on April 9, 1866, the House followed the lead of the Senate and overrode the President's veto. Never before had Congress overriden the veto on a major political issue, *W. Brock, An American Crisis,* 115 (1963).

C. 42 U.S.C. §1981, Should be Construed as Broadly as 42 U.S.C. §1982.

As noted above in Note 2, both 42 U.S.C. §1981 and 1982 were derived from §1 of the Civil Rights Act of 1866. By their terms, both statutes undoubtedly cover white persons in that § 1982 applies to all citizens[46] while § 1981 protects a still broader class of all *persons.*

In light of the historical relationship between §§ 1981 and 1982, this Court has recognized that they should be construed consistently. *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.,* 410 U.S. 431, 439-40 (1973). When construing the language of § 1982, this Court noted that the statute was written in "plain and unambiguous terms", *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 420 (1968), and refused to believe that the broad language of the 1866 Act "was a mere slip of the legislative pen", *Id.* at 427. Rather the Court quoted with approval *United States v. Price,* 383 U.S. 787, 801 (1965) wherein it was stated:

> We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it at a sweep as broad as its language.

Jones v. Alfred H. Mayer, Co., 392 U.S. at 437.

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46. § 1982. Property rights of citizens.
All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

After an extensive examination of the legislative history of the Civil Rights Act of 1866, this Court in *Jones* recognized the sweeping nature of the protection afforded by the Civil Rights Statute by holding that:

> §1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment. (Emphasis in original).

492 U.S. at 413.

Based on its holding in *Jones,* this Court again dealt with the 1866 Act in *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969). In that case, Sullivan, a white, leased his home to Freeman, a black. In conjunction with the lease, Sullivan also assigned to Freeman his membership shares in the respondent corporation which ran community recreation facilities. A membership share entitled the immediate family of the shareholder to use the corporation's recreation facilities. Because of Freeman's race, the corporation refused to approve Sullivan's transfer of membership. When Sullivan protested the refusal, he was accorded a hearing of the corporation's board and was expelled from the corporation. Sullivan and Freeman brought suit under 42 U.S.C. §§ 1981 and 1982 for injunctions and monetary damages. On these facts, this Court held that Sullivan, the white, had standing to sue. 392 U.S. at 237. While the rationale of the Court was expressed in terms of § 1982, there is nothing in the opinion that limits Sullivan's standing to sue to § 1982 alone; and since § 1981 is the "statutory twin" of § 1982, *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 994 (D.C. Cir. 1973), the holding in *Sullivan* must be

deemed to be a recognition that white persons have standing to sue under § 1981 as well.

In *Tillman v. Wheaton-Haven Recreation Assoc. Inc., supra,* this Court confirmed the standing of a white person to sue under §§ 1981 and 1982 when that person has suffered the consequences of racial discrimination directed against blacks. There, a white husband and wife, the Tillmans, invited a black guest, Mrs. Rosner, to a community swimming pool operated by the respondent corporation. After admitting Mrs. Rosner on one occasion, the association promptly changed its policy to limit guests to relatives of members. Based on the subsequent refusal of the association to admit Mrs. Rosner to the pool, the Tillmans and Mrs. Rosner sought damages and declaratory and injunctive relief under 42 U.S.C. §§ 1981 and 1982. It bears emphasis, that even more strongly than in *Sullivan,* the white petitioners in *Tillman* were asserting their own property rights under § 1982 as well as their contract rights under § 1981, since when it refused to admit Mrs. Rosner, Wheaton-Haven substantially reduced the value of the Tillmans' membership rights. In remanding on the question of relief, the Court left untouched the white petitioners' claim under § 1981 stating that the reasoning supporting the court's rejection of Wheaton-Haven's defense, that it was exempt from § 1982 as a private club, applied equally to § 1981. Viewed realistically, *Sullivan* and *Tillman* firmly establish a white plaintiff's standing to sue under § 1981 when that person's contract rights are impaired by racial discrimination directed at blacks, see *Buchanan* at 858-59.

Even though this Court has never directly held that white plaintiffs have standing to sue under §1981 when they are the object of racial discrimination, it has gone to

the very brink of such a holding in *Sullivan* and *Tillman*. A refusal to take the logical step now would create the anomalous situation where one white person, economically damaged by racial discrimination directed at blacks may recover for those damages, while another white person who endures *both* the humiliation of discrimination *and* resulting economic damage is left without remedy. Most assuredly the one thing a white victim of discrimination will be left with is the bitter realization that were his skin darker, he would have been made whole. To say the least, this unseemly result taxes one's sense of justice.

D. The Better Reasoned Lower Federal Court Opinions Have Consistently Recognized that §1981 Covers Whites as well as Non-Whites.

As early as 1905, lower Courts recognized that statutes derived from the 1866 Act are to be interpreted to apply to white persons as well as non-whites. *See, Kentucky v. Powers*, 139 F. 452, 494-95. (Cir. Ct. E.D. Ky. 1905). But of the lower court decisions addressing the question of whether a white plaintiff can sue under §1981 when subjected to invidious racial discrimination,, *Hollander v. Sears, Roebuck & Co., supra,* stands out as a singularly well studied opinion. In that case, the defendant was conducting interviews for its summer internship but denied the plaintiff an interview solely because he was white and not a member of a minority group. Finding the legislative history of the 1866 Act to be of prime importance in determining the scope of §1981, the court in *Hollander* conducted an extensive examination and found that, "In light, then, of this legislative history, it is quite clear that §1981 should not be read as only providing a cause of action for non-whites". 392 F. Supp. at 94.

The court then squarely held that white plaintiffs may have a cause of action under §1981 when they are the object of racial discrimination within the scope of activities protected by §1981. *Id.*

Two other cases holding that white persons had stated a cause of action under §1981, *Gannon v. Action,* 303 F. Supp. 1240 (E.D. Mo. 1969); and *Central Presbyterian Church v. Black Liberation Front,* 303 F.Supp. 894 (E.D. Mo. 1969), involved essentially identical facts. In these cases, black activists conducted on-going disruptions of predominantly white churches in order to press their demands for financial and other aid to blacks. In both cases, the court found that the white plaintiffs had stated a cause of action under §1981 since the black protesters had violated the right of the plaintiff Church and its members to equal benefit of laws for the security of property as guaranteed by §1981. *See, Gannon* at 1244-45 and *Central Presbyterian Church* at 901. In so holding, the court in *Central Presbyterian Church* noted that:

> While the Court recognizes the fact that these statutes [§§1981 and 1982] were passed primarily to insure the rights of non-white Americans, nothing in the statutes limit their application to cases where the civil rights of non-whites are being violated. Indeed, it would be unfair to deprive white Americans of the benefit of these sections when their constitutionally protected rights are being violated.

303 F. Supp. at 899.

In *WRMA Broadcasting Co., Inc. v. Hawthorne*, 365 F. Supp. 577 (D.C. Ala. 1973), the plaintiffs charged that the defendants, motivated by racial prejudice, were

conspiring to force the discharge of the white manager of radio station WRMA. Charging that the defendants, black employees of WRMA, were violating 42 U.S.C. §§1981 and 1985(3), the plaintiffs sought a preliminary injunction to enjoin defendants from threatening commercial advertisers on WRMA with a boycott and picketing of their stores unless they agreed to cease advertising on WRMA. In the course of deciding whether plaintiffs had established a probable right to relief, the court addressed the question of whether a white plaintiff may sue under §1981. *Id.* at 365 F. Supp. 580. Examining the constitutional basis of §1981, the court held that whites do indeed have standing to sue under §1981 stating:

> While in the past it might have been thought, as a conceptual matter, that the Thirteenth Amendment granted power to Congress to provide for the civil rights of blacks only, and not of whites, this conclusion is not necessary and is not even logical. Congress, pursuant to the Thirteenth Amendment, could and did provide in the reconstruction civil rights statutes that the rights of blacks should be the same as the rights of whites. It is reasonable to assume that Congress, in acting to secure the rights of all persons against racial discrimination, could pass general laws providing that all races shall be treated equally in certain respects. Under such a general statute, it is entirely proper that a white citizen could benefit incidentally from the elimination of badges and incidents of slavery. Obviously most racially-motivated deprivations of civil rights are and have always been aimed at blacks. However, in those rare instances when a white alleges racial discrimination under Section 1981, it is entirely consonant with the purpose of Section 1981, that whites discriminated against for racial reasons should have standing under Section 1981, and the power of Con-

> gress so to provide is a power ancillary to the enabling clause of the Thirteenth Amendment.

365 F. Supp. at 581, *Cf. Walker v. Pointer,* 304 F. Supp. 56, 60 (N.D. Tex. 1969).

Upon examining the above decisions, it is readily apparent that those courts holding that whites have a cause of action under §1981 when they are subjected to racial discrimination have done so only after a careful analysis of the Thirteenth Amendment basis of the statute, a thoughtful reading of statute and, most recently in *Hollander v. Sears, Roebuck & Co., supra,* a detailed examination of the legislative history of the 1866 Act. On the other hand, those cases cited for the opposite proposition, have not been so carefully reasoned. Even a cursory examination of those cases cited by the Fifth Circuit in support of its denial of petitioner's standing to sue under §1981 reveals that those holdings were founded upon superficial analysis, or are obviously distinguishable from the case at bar.

For instance, the court in *Van Hoomissen v. Xerox Corp.,* 369 F. Supp. 829 (N.D. Cal. 1973), denied the white plaintiff standing to sue under §1981, not because it felt that the statute did not protect whites, but rather because the detriment suffered by the plaintiff was not *due to his race.* In that case, the plaintiff merely alleged that he was fired in retaliation for attempting to change the hiring policy of Xerox which the plaintiff felt discriminated against Mexican-Americans. Clearly, the motivation for the discharge was not the plaintiff's race but his advocacy of a clause. See, 368 F. Supp. at 838-39. And just as clearly, *Van Hoomissen* cannot therefore, be regarded as a refusal to grant white persons, as a class,

standing to sue under §1981 when they are the object of racial discrimination.

Likewise, the case of *Kurylas v. U.S. Dept. of Agriculture*, 373 F. Supp. 1072 (D. D.C. 1974) aff'd., 514 F.2d 894 (D.C. Cir., 1975)[47] is readily distinguishable. There, the white plaintiff sued under §1981 alleging discrimination based on his *national origin*—not his race. The dispute in that case centered around a low job-performance rating given Dr. Kurylas, a veterinarian, because of his low score on a segment of the evaluation addressed to oral communication ability. The court's holding in *Kurylas* leaves no doubt that the plaintiff's claim under §1981 was denied because it was predicated upon a charge of discrimination based on national origin. Indeed, the court noted that white persons had been permitted to bring an action under §1981 where the complaints alleged a *racially* motivated infringment of their rights, *Id.* at 1074-75.

Perkins v. Banster, 190 F. Supp. 98 (D. Md. 1960), aff'd, 285 F.2d 426 (4th Cir. 1960) was a *pro se* action under 42 U.S.C. §§1981 and 1983 where a white plaintiff indicated that his claim was for "false arrest or false indictment or malicious prosecution or denial of due process and also for slander". *Id.* at 99. Ruling orally on what it obviously considered a vexatious suit, one in which the court expressed fear that the plaintiff might perjure himself, the court dismissed the action under §1981 in two sentences of the opinion stating that the court read

47. The district court's decision was affirmed without opinion. An explanatory memorandum accompanied the judgment of the circuit court, however the memorandum was not published inasmuch as it should not be cited in briefs of counsel as precedent. See, 514 F.2d 894.

§1981 to apply only to non-whites. *Id.* at 99. The Fourth Circuit affirmed *per curiam* based on the district court's opinion. From an honest reading of the district court's opinion, it is apparent that the court's ruling was guided more by the frivolous nature of the suit than upon careful analysis of the point of law involved. Plainly, the true deficiency of the plaintiff's cause of action in *Perkins* was not that the plaintiff was white, but that no allegation of *racial* discrimination was made. Viewed in the proper light, the rationale of *Perkins* must be regarded as an unfortunate concession to a crowded docket.

Another case cited by the court below for the proposition that white persons do not have standing to sue under § 1981 is *Ripp. v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Inasmuch as *Ripp* relies on *Perkins*, it too must be deemed to be unsound in reasoning.

As demonstrated above, § 1981 was undeniably intended by Congress to protect white plaintiffs. Yet, guided by an incautious examination of the above cited cases and without the benefit of the legislative history of §1981, the courts below rendered § 1981's promise of racial equality of *all* persons empty and meaningless.

As our American society continues its movement towards racial equality it seems inevitable that more instances of racial discrimination directed at white persons will appear. To give § 1981 a "blacks only" construction in the face of this reality would be peculiarly unjust, and would almost certainly intensify existing racial tension. Moreover, such a construction would result in the absurd situation where § 1981, the very purpose of which was to end racial discrimination, itself becomes a vehicle whereby racial discrimination is perpetuated.

On the other hand, a construction of § 1981 giving white persons standing to sue would not only be consonant with the intent of the Congress that passed the Civil Rights Act of 1866, but would be a progressive recognition of the needs of this Country in the years ahead. For the foregoing reasons, Petitioners respectfully submit that the decision of the court below should be reversed and remanded for a trial on the merits.

III.

ALLOWING WHITES STANDING TO REDRESS INVIDIOUS NON-REMEDIATING DISCRIMINATION UNDER TITLE VII, AND 42 U.S.C. §1981 WILL NOT INTERFERE WITH THE SALUTORY PURPOSES OF AFFIRMATIVE ACTION.

Many persons fear that a holding that white persons have standing to sue under Title VII and § 1981 will spell the demise of "Affirmative Action". This simply is not true. Indeed, Petitioners recognize the importance of affirmative action in the achievement of social justice and to the development of a racially harmonious industrial society.

Affirmative action is the remedial relief necessary to redress the present effects of past discrimination.[48] *Swann v. Charlotte-Meeklenberg Board of Education,* 402 U.S. 25 (1971); *United States v. International Brotherhood of Electrical Workers, No. 38,* 428 F.2d 144 (6th Cir. 1970), cert. denied, 400 U.S. 943 (1970). Accordingly, once a violation of Title VII or § 1981 is established, a District Court may impose hiring goals as a remedy. *United States v. Lathers Local 46,* 471 F.2d 408 (2d

48. Cf. *Karst and Horowitz, Affirmative Action and Equal Protection,* 60 U. Va. L. Rev. 955, 964 (1974).

Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir.) cert. denied, 404 U.S. 984 (1971); *Contractors Assn of E. Pa. v. Secretary of Labor,* 442 F.2d 159 (3d Cir.), cert denied, 404 U.S. 854 (1971). See also, *Rios v. Enterprise Association Steamfitters Local 638,* 520 F.2d 352 (2d Cir. 1975). Whether called quotas, numerical objectives[49], freezing[50] or mathematical ratios[51], their laudatory purposes remain the same and have been recognized by this Court as mere starting points in the process of shaping remedies, rather than inflexible requirements. *Swann, supra.*

But such is not the case here. The racial discrimination to which Petitioners were subjected has never been justified by Respondent as a measure to improve the status of minorities within the Santa Fe Transportation Company. It simply constitutes invidious racial discrimination; that is, discrimination not justified by a compelling need to remedy past wrongs.

The question presented then becomes whether a white victim of invidious, non-remediating discrimination, is to be left defenseless in a situation where a black person would clearly have a cause of action. Petitioners submit that to answer this question in the affirmative would only serve to further polarize black and white America. A racially polarized Country will be incapable of delivering one of the great promises of America's third century—equal employment opportunities for all.

49. *Southern Illinois Builders Association v. Ogilvie,* 471 F.2d 680 (7th Cir. 1972).

50. *Robinson v. Lorillard Corp.,* 444 F.2d 791 (7th Cir. 1971) cert. dismissed 404 U.S. 1006 (1972).

51. *Swann v. Charlotte Meeklenberg Board of Education, supra.*

CONCLUSION

In finding that Petitioners had failed to state a claim upon which relief could be granted, the court below committed a serious omission which has operated to deprive Petitioners of those very rights which Title VII and 42 U.S.C. § 1981 were enacted to secure. For this reason, and the reasons stated in this brief, this Court should reverse the lower court's decision and remand with instructions that the matter proceed to trial on the merits.

Respectfully submitted,

HENRY M. ROSENBLUM
ROBERT B. O'KEEFE
4635 Southwest Freeway
Suite 320 West
Houston, Texas 77027
(713) 629-0650

Counsel for Petitioners

APPENDIX A

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2158

HOWARD HABER,
Plaintiff-Appellant

v.

E. T. KLASSEN, ET AL.,
Defendants-Appellees.

SUGGESTION OF REMAND

Defendants-Appellees respectfully suggest that this Court remand this cause to the district court. In the view of the appellees, this case was decided upon an erroneous ground by the district court, and consequently should be remanded.

1. This is an action alleging employment discrimination brought by a white male Postal Service employee against the federal government under 1972 amendments to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16. The district court on June 30, 1975, issued a memorandum opinion and order granting the government's motion for summary judgment. The court held that white persons could not obtain relief for racial discrimination under Title VII:

> The plaintiff in this case claims that he, a member of the white race, was discriminated against because of his race, and further alleges that he is entitled

> to relief under § 2000e-16. However, true the former proposition, the latter is false. Members of the white race may not seek relief for racial discrimination under Title VII, and thus defendants are entitled to judgment.

Opinion at 3. The court made no alternative findings with regard to whether the record showed that plaintiff was discriminated against or not.

2. The court's holding improperly construes the Civil Rights Act. 42 U.S.C. § 2000e-16(a) expansively provides that all federal personnel actions "shall be made free from any discrimination based on race, color, religion, sex, or national origin." Discrimination against whites is certainly discriminaton based on race and color. See, e.g., *Parks v. Dunlop,* C.A. 5, No. 75-1786, decided August 13, 1975; *Phillips v. Columbia Gas of West Virginia, Inc.,* 347 F. Supp. 533 (S.D. W.Va., 1972), aff'd *per curiam,* 474 F.2d 1342 (C.A. 4, 1973); *United States v. International Longshoremen's Assoc.,* 334 F. Supp. 976, 979 (S.D. Texas 1971), rev'd on other grounds *sub nom. EEOC v. International Longshoremen's Assoc.,* 511 F.2d 273 (C.A. 5, 1975); *Smith v. Gunther,* 9 EPD ¶ 9915 (D. D.C. 1975); *Leinster v. Engman,* 8 EPD ¶ 9774 (D. D.C. 1974).

None of the authority cited by the district court supports the conclusion that whites are not entitled to protection from racial discrimination under Title VII. In *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205 (1972), which involved housing rather than employment discrimination, the discrimination affording relief in that case was discrimination against nonwhites, but the Court never explicitly or implicitly indicated that discrimination against whites would not be a basis for affording relief.

In *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), while the Court stated that the Congressional objective was

> to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,

401 U.S. at 429-30, the Court also stated,

> [d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

401 U.S. at 431. Finally, while the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973) indicated that belonging to a racial minority may be a step in making a *prima facie* case of racial discrimination, the Court carefully noted that different standards for making a *prima facie* case may apply in different factual situations. 411 U.S. at 802 n. 13. The district court in the instant case was thus in error in holding that whites are not protected from race discrimination under Title VII of the Civil Rights Act.

3. Inasmuch as the Title VII federal employee provisions contemplate review of the administrative record in the first instance by the district court, a remand is appropriate in this case to permit the district court properly to make a determination in the first instance as to whether the administrative record showed discrimination.

4. Counsel for plaintiff, Mr. Harry L. Haber, has authorized us to state that he concurs in the remand of this case to the district court.

Accordingly, appellees respectfully suggest to this Court that this cause be remanded to the district court.

Respectfully submitted,

/s/ Robert E. Kopp
ROBERT E. KOPP

/s/ John M. Rogers
JOHN M. ROGERS,
Attorneys,
Appellate Section, Civil Division,
Department of Justice,
Washington, D.C. 20530.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1975, I served the foregoing Suggestion of Remand by causing a copy to be mailed, air mail, postage prepaid to:

Harry L. Haber, Esquire
1422 Som Center Road
Mayfield Hts., Ohio 44124

/s/ John M. Rogers
JOHN M. ROGERS,
Attorney.

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners,

v.

SANTA FE TRAIL TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT SANTA FE TRAIL TRANSPORTATION COMPANY

RONALD A. LANE
SHELLEY J. VENICK
C. GEORGE NIEBANK, JR.
80 East Jackson Boulevard
Chicago, Illinois 60604
(312) 427-4900

Attorneys for Respondent Santa Fe Trail Transportation Company

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL & APFFEL, INC.
808 Sealy & Smith Professional Building
200 University Boulevard
Galveston, Texas 77550

Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners,

VS.

SANTA FE TRAIL TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT SANTA FE TRAIL TRANSPORTATION COMPANY

QUESTIONS PRESENTED

The questions presented are as stated by Petitioners:

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981.

STATEMENT OF THE CASE

Petitioners have glossed over or neglected to mention several matters which we regard as of considerable importance.

They pleaded their case in the District Court as a class action not only for themselves but also "on behalf of other persons similarly situated." (App. p. 35.) They sought declaratory and injunctive relief from an allegedly discriminatory "policy, practice, custom or usage" of imposing more severe discipline upon white employees than that imposed on black employees. (App. pp. 36, 41.)

Their effort to present a "class action" was rejected by the District Court. (App. p. 104.) There has since been no move to revive it. No attempt was ever made to press the "pattern and practice" charge of imposing disparate discipline on the basis of race.

So Petitioners stand before this Court by themselves. For the purpose of decision here, they were dismissed from our employ for "misappropriating company property"—that is to say, stealing.[1] No criminal charges were ever lodged, although it should be noted that theft of company property with a value in excess of $200.00 is a felony under Texas law. Article 31.03, Vernon's Texas Codes Annotated—

[1] Technically, it was not "misappropriation of company property" which was involved but rather misappropriation from a shipment being handled by Respondent Santa Fe Trail Transportation Company. (App. p. 65.)

Penal. Both courts below noted that neither Petitioner contended he had been wrongfully charged. (App. pp. 107, 122.) At this late date they do attempt a rather weak protest to the contrary at pp. 18-19, n. 37, of their Brief, but we believe the findings of the courts below must be accepted.

Although not a party to these proceedings, a very interested bystander is one Charles Jackson, a black employee of Respondent Santa Fe Trail Transportation Company ("Santa Fe") at the time the events underlying this case transpired. Petitioners alleged in their complaint that Jackson had also been charged with theft of company property along with them but they were fired and he was not, the apparent disparity in discipline due, they say, to their white and his black skin. (App. p. 38.) There is nothing in the record to indicate, however, that Jackson had failed to dispute the alleged charge of participation in a theft of company property.

Finally, we should like to point out that no one argued in the courts below that whites do not have standing to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and neither the District Court nor the Court of Appeals ruled that whites have no rights under Title VII. The courts did rule that *these particular white Petitioners* had failed to state a claim upon which Title VII relief could be granted.

SUMMARY OF ARGUMENT

On the basis of the entire record, Petitioners failed to advance any support whatever for their allegations that they had been disciplined more severely because they are white than was a black co-worker. The record convincingly demonstrates that Petitioners could not sustain a claim on which relief could be granted under Title VII of the Civil Rights Act of 1964.

If review must be restricted to the pleadings, Petitioners still fell short of presenting a case under Title VII. They themselves alleged that they had been discharged from employment for theft of company property, and they have not denied the truth of the charge against them. Under such circumstances, we submit that in order to plead a prima facie case Petitioners must, considering the wide discretion of management in disciplining its employees, go further than merely allege that a black co-worker was similarly charged with theft of company property and was not discharged. In substance, Petitioners are not complaining about what happened to them but about what did not happen to someone else.

Even if race may have been one of a number of factors in our determination that, all things considered and exercising our discretionary disciplinary authority, we would not discharge a black employee who allegedly was involved with Petitioners in a theft of company property, there was still no violation of Title VII. If such be regarded as "reverse discrimination," it is nevertheless not "invidious" under the circumstances of this particular case and not contrary to Title VII.

Absolute racial neutrality in all employment decisions may be a desirable theoretical objective but it is not only impractical it would be inconsistent with and counterproductive to the goals of Title VII. "Affirmative action" is presently an accepted aspect of the on-going civil rights program of the United States. By definition it involves at least some measure of preference of or advantage for blacks and other racial minorities in connection with employment decisions. An interpretation of Title VII which would require all employment decisions to be made on the basis of competence alone would mean the end of "affirmative action"

and a marked slowing of the pace of progress of blacks and other racial minorities. Congress never intended Title VII to have such a result.

The wording of the pertinent part of the Civil Rights Act of 1866, 42 U.S.C. § 1981, together with its historical context and purpose, indicate that Congress did not intend to extend its protection to whites. Its purpose was only to protect blacks. Accordingly, whites cannot maintain a cause of action under § 1981. The lower court decisions which have so held are correct. Those to the contrary either involve especially unique facts and are, therefore, distinguishable, or they were incorrectly decided.

ARGUMENT

I. DISMISSAL OF WHITE EMPLOYEES WHO DO NOT DENY CHARGES OF MISAPPROPRIATING COMPANY PROPERTY WHILE NOT DISMISSING A SIMILARLY CHARGED BLACK DOES NOT, STANDING ALONE, RAISE A JUSTICIABLE CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In a very real sense, Petitioners are complaining less about what happened to them than about what did not happen to Jackson. If he had been fired when they were, this case would never have been filed. Although Petitioners seek reinstatement with lost wages (App. p. 41.), presumably the basic wrong of which they complain could be remedied not by reinstating them but by firing Jackson. Viewed in this light, we have difficulty seeing this case as one worthy of this Court's attention.

That difficulty becomes more acute when we consider that this case has come to the Court on the basis of a successful Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure, as a result of which we may be com-

pelled to accept that view of the facts most favorable to Petitioners as stated in their Complaint. The District Court, however, had a good deal more to consider than the skeletal allegations of the Complaint—as we will shortly demonstrate. When these are considered, it is apparent that the case which Petitioners would have this Court review is a purely hypothetical one. The real case is quite different.

A. On the Record as a Whole, Petitioners Plainly Failed to State a Cause of Action Under Title VII

Our successful motion in the District Court was styled a Motion to Dismiss. Insofar as the Complaint was based on § 1981, it was dismissed for want of jurisdiction under Rule 12b(1). (App. p. 114.)[2] The Title VII count was dismissed for failure to state a claim upon which relief could be granted. (App. p. 117.) In this connection, the District Court was required to accept as true the well-pleaded material facts alleged in the Complaint, taking that view of the case most favorable to Petitioners. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236-37 (1974); *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972); *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167, 172 (1967); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). However, Rule 12(b) allowed the court to treat the motion as one for Summary Judgment under Rule 56, Fed. Rules Civ. Proc., and in connection therewith to consider all the depositions, answers to interrogatories or affidavits in the file in addition to the naked allegations of the Complaint. Rule 56(e). Even if the § 1981 motion is to be viewed as raising jurisdictional issues, the District Judge was free to resort to matters beyond the pleadings. *Land* v. *Dollar*,

[2] If dismissal was appropriate, it should have been for failure to state a claim upon which relief could be granted rather than for want of jurisdiction. *Montana-Dakota Utilities Co.* v. *Northwestern Publ. Serv. Co.*, 341 U.S. 246, 249-50 (1951); *see Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 213, n. 9 (1974) (Douglas, J., dissenting).

330 U.S. 731, 735, n. 4 (1947); *Pintozzi* v. *Scott*, 436 F.2d 375, 378 (7th Cir., 1970); *Troup* v. *McCart*, 238 F.2d 289, 292 (5th Cir., 1956).

There was quite a bit more to consider than the bare bones of the complaint. There had been more than two and a half years of pre-trial activity, and the file contained not only the Complaint and Answer, but also Motions, Memoranda, Briefs, Interrogatories, Answers to Interrogatories, and Depositions. All this material was provided the Court of Appeals and much of it is contained in the printed Appendix which comprises the record furnished this Court.

We believe that District Judge Bue did, in fact, review the entire record and dispose of this case as a summary judgment. At one point in his Modified Memorandum and Opinion of June 13, 1974, he stated:

> "With regard to plaintiff's class action allegations, *the Court has considered the entire record* and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23 (c) (1)." (App. p. 114, emphasis supplied.)

Petitioners themselves go beyond the narrow limits of the pleadings at notes 37, 38, and 39, pp. 18-19, of their Brief.

Viewing the record as a whole, we submit that the courts below did—and this Court should—take into account the following:

1. Our Answer to the "Second Amended Complaint" specifically denied that Petitioners were discharged "by reason of their caucasian race." (App. p. 65.)

2. Furthermore, we answered that:

> "This defendant denies that plaintiffs, along with one negro employee, Charles Jackson, were all charged jointly and severally with misappropriating company property, but admits that a general investigation of misappropriated cargo and cargoes, including ten (10) cases of six (6) one-gallon cans of anti-freeze, was instituted and conducted, along with an investigation of possible violation of company rules, which investigation did include plaintiffs, Laird and McDonald, and employee, Charles Jackson, and others." (App. p. 65.)

3. And additionally stated that:

> "This defendant admits that on or about October 2, 1970, plaintiffs, L. N. McDonald and Raymond Laird, were discharged, and admits that negro employee, Charles Jackson, was not discharged, but denies any discrepancy in disciplinary sanctions among or between these employees by reason of their race." (App. p. 66.)

These answers are consistent with those pleaded by the defendant Union. (App. p. 59-60.)

4. In sworn Answers to Interrogatories (App. pp. 32-34.) we informed Petitioners and the courts:

> "I. (a) L.N. McDonald was discharged because of his dishonesty in the theft of company freight off of company equipment on company property and for violation of company rules.
>
> "(b) Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules.
>
> • • • • •

> "XI. Charles Jackson was not charged with misappropriating company property.
>
> "XII. Plaintiffs were discharged for reasons other than race. The reasons are outlined in Answer to Interrogatory No. 1, and the company has written Statements of the plaintiffs in support thereof."

Despite two and a half years of pre-trial activity, Petitioners never came forward with any facts to support their claim of racially disparate treatment. Reviewing this one-sided record, Judge Bue could properly have rendered summary judgment for Santa Fe. Rule 56(e) allows the court, in a case such as this, to pierce the pleadings and determine that a party cannot possibly support his unfounded allegations. *First Nat'l Bank of Ariz.* v. *Cities Service Co.*, 391 U.S. 253, 288-90 (1968); Advisory Committee Notes to 1963 Amendments, Fed. Rules Civ. Proc., Rule 56, 28 U.S.C.A. 416; *Modern Home Institute, Inc.* v. *Hartford Accid. & Indemnity Co.*, 513 F.2d 102, 109, 114 (2nd Cir., 1975); *Abiodun* v. *Martin Oil Service, Inc.*, 475 F.2d 142, 144 (7th Cir., 1973), *cert. den.*, 414 U.S. 866 (1975). *Cf., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 160 (1970).

The court indicated in its Memorandum and Order of January 4, 1975, that it was only assuming, *arguendo,* that Jackson was equally culpable with Petitioners and that their discharge was racially motivated; it invited the parties to explore that question. (App. p. 94.) Nonetheless, Petitioners produced no evidence to back up their charges.

Since there was no genuine issue as to either the cause of the disparate treatment accorded Messrs. Laird, McDonald and Jackson or as to racial motivation, Santa Fe was en-

titled to summary judgment as a matter of law. Rule 56(c), Fed. Rules Civ. Proc.; *Tyler* v. *Vickery*, 517 F.2d 1089, 1094-95 (5th Cir., 1975).

B. Even if Review is Limited to the Pleadings in Their Present Posture, Petitioners Have Plainly Failed to State a Cause of Action Under Title VII

Most of Petitioners' Brief on the Civil Rights Act of 1964 question is misdirected to the broad question of whether whites as well as minorities are entitled to Title VII's protection. This case presents a much narrower question.

To simplify matters as best we can, we concede that as a general proposition whites are, under appropriate circumstances, protected against racially discriminatory employment decisions by Title VII.

However, that general proposition means little or nothing in the context of the case at bar. Petitioners are not hapless whites discharged at an employer's whim—they are whites charged with stealing property entrusted to the custody of their common carrier employer, and in the courts below they did not deny the truth of these charges. They have abandoned their fruitless allegation that we engaged in a pattern and practice of discriminatory discipline favoring blacks at the expense of whites. And they have never claimed that their discharges were somehow a subterfuge or pretext on our part to cover up a racially discriminatory employment decision.

Petitioners are white and Jackson is black. We fired them for stealing but did not fire him. We admit that our action may superficially smack of discrimination. But we submit that white men fired under these circumstances must plead and prove more than a superficial case if they are to state

a claim upon which Title VII relief might be granted. We think that is the import of the decisions of the courts below and we think they were correct.

The critical factor is that our decision was reached in exercise of our unquestionable right to discipline dishonest employees. Management must be and is vested with wide discretion in administration of discipline. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937); *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937); *NLRB* v. *Ogle Protection Service, Inc.*, 375 F.2d 497, 505 (6th Cir., 1967), *cert. den.*, 389 U.S. 843.

Standing alone, our decision to fire Petitioners for stealing is unassailable. In exercise of our disciplinary discretion, however, we did not discharge Jackson. There may have been any number of reasons having nothing whatever to do with race for the apparent leniency extended to him. But it is this apparent leniency in favor of a third man upon which Petitioners base their entire case.

Surely Congress did not intend to afford Title VII relief on such a flimsy basis. This Court's comparatively recent decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), is instructive. There the company refused to re-employ a black on the basis of unlawful conduct directed against it while he had been laid off during a general reduction in work force. He claimed that refusal to rehire was racially motivated in violation of § 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), and was in retribution for his civil rights activities in violation of § 704(a) of the Act, 42 U.S.C. § 2000e-3(a). The Court enunciated a specific test which one must satisfy in order to make out a prima facie case of discrimination, a test which the respondent, Green, had met. For its part, the

company contended that it had refused to rehire Green because of his unlawful conduct against it while he was laid off. This the Court ruled was sufficient to meet the company's burden of proof at the opening of the case and met Green's prima facie discrimination case. 411 U.S. at 803. With respect to the weight to be accorded the company's reason for refusing to rehire Green, the Court said:

> ". . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled. Respondent admittedly had taken part in a carefully planned 'stall-in' designed to tie up access to and egress from petitioner's plant at a peak traffic hour. [Footnote omitted.] Nothing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it."[1] 411 U.S. at 803.

On the same point, the Court said:

> "Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." 411 U.S. at 804.

Finally, by way of summary, the Court directed:

> ". . . In short, on the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons

> for his rejection were in fact a coverup for a racially discriminatory decision." 411 U.S. at 805.

In the case at bar, Petitioners did not cause a traffic jam. They stole property entrusted to the custody of their common carrier employer. One, Laird, occupied a supervisory position as a Dock Foreman; the other, McDonald, was a truck driver. Both therefore had been entrusted with a good deal of responsibility with respect to the security of shipments handled by Santa Fe. The pleadings are silent as to the position of Jackson, the black who was not discharged.

Petitioners, in the course of filing three successive complaints (App. pp. 4, 21, 35.), had more than enough opportunity to plead a case which would have more to it than a bare allegation that they are white and were disciplined differently than a black co-worker. They have not alleged with any particularity the degree of similarity, if any, between their roles in the theft involved in their discharges and the part played by Jackson.

Petitioners themselves pleaded that they had been discharged for theft, and when they failed to deny the validity of the charges against them they refuted what otherwise might have been the first block in the foundation of a prima facie case. Accepting the premise, which for present purposes we assume we must, that Petitioners were discharged for stealing, our reason for discharging them must be accorded great weight—it is "presumptively valid" and, in the absence of something more, will serve to rebut what might otherwise appear to be a prima facie case. *McDonnell Douglas Corp.* v. *Green, supra,* at 803, 804, 805.

We cannot fairly say what "more" one in the position of Petitioners must allege in order to plead a prima facie case because no one—not even this Court—can foresee the factual variations which future litigation may produce. But

whatever "more" might be in any other case, these particular Petitioners have failed the test. The courts below properly ruled that they failed to state a claim which would entitle them to relief under Title VII of the Civil Rights Act.

There is another but related aspect of this Court's decision in *McDonnell Douglas Corp.* v. *Green, supra,* which should also be recalled. The Court there spelled out very carefully the essentials of a prima facie case under Title VII:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

The Court was careful to warn that this specification "is not necessarily applicable in every respect to differing factual situations." *Id.* n. 13.

Taken literally, a white would usually be hard put to meet the first requirement that he show he was a member of a racial minority, although there have been cases of whites in black-dominated or controlled enterprises who could plead such a case. *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F.Supp. 577 (M. D. Ala., 1973). So, if applied literally and uniformly, this requirement would almost automatically preclude whites from any Title VII relief on the basis of race. Accordingly, we do not believe this Court intended this hurdle to be surmounted in a case such as that at bar.

The second requirement would appear to be one which would be applicable in most every case, certainly including this one—that a complainant must be qualified for the job he wants to get or keep. Our judgment that Petitioners were no longer qualified on this score can hardly be faulted, for they demonstrated that they could not be reliably entrusted with the property of others in possession of their common carrier employer. They are compelled to try to implicate a fellow employee in their own unlawful conduct in an effort to establish that he is equally untrustworthy but was not penalized as severely as they because of his race. We cannot imagine that Congress was much concerned with the plight of men in their position and intended to accord them Title VII protection. They fail the prima facie test prescribed in *McDonnell Douglas.*

1. Absolute racial neutrality in all employment decisions would retard rather than advance the primary purpose of Title VII

On a number of occasions this Court has spoken in sweeping terms of the basic objective of Title VII. Turning again to *McDonnell Douglas,* we see that the Court said:

> "There are societal as well as personal interests on both sides of this [racial equality in employment] equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that *Title VII tolerates no racial discrimination, subtle or otherwise.*" 411 U.S. at 801. (Emphasis supplied.)

As an abstract ideal, perhaps *every* employment or personnel decision should be absolutely color-blind. But this is a practical world, and few parts of it are more practical than where employment or personnel decisions are made.

We submit that absolute racial equality under every conceivable circumstance might very well be counter-productive. Mr. Jackson would certainly have thought it so if we had concluded that the law compelled us to fire him as well as Petitioners—all under the banner of racial equality.

Assuming for the moment that our local manager who made the decision to fire Petitioners but retain Jackson had been influenced to some slight degree by Jackson's race, perhaps thinking to himself, "Jackson's black, all things considered, we'll give him a break," we cannot believe that we thus ran afoul of the intent of Congress expressed in Title VII. We are a government contractor subject to Executive Order 11246, as amended, 3 C.F.R. 169, which is the basis of an extensive civil rights program apart from the Civil Rights Acts of 1866 and 1964, 41 C.F.R. Chapter 60. The sanctions prescribed in that Order include cancellation of the underlying government contracts and ineligibility for future contracts. E.O. 11246, *supra*, §§ 209(5), (6); 41 C.F.R. § 60-1.30. If, in the action of which Petitioners complain, we violated Title VII, is it possible that under Executive Order 11246 we might lose our government contracts because we may have decided, all things considered, to give Jackson a "break?"

2. Absolute racial neutrality in all employment decisions would be inconsistent with federal policy as reflected in "affirmative action" programs

In determining whether Congress intended in Title VII that each and every employment decision must be absolutely color-blind, this Court should consider the impact of such a ruling on the various forms of "affirmative action" programs being promoted or approved across the country by the Department of Justice, Department of Labor, the federal courts, and especially the Equal Employment Opportunity Commission.[3] The very heart of each of these programs is to encourage or even require employment decisions which, insofar as they relate to race, are anything but color-blind. They customarily call for employers to favor minorities to a greater or lesser degree, usually until some specific minority employment "profile" has been secured. An excellent pamphlet has been published by the EEOC—*Affirmative Action and Equal Employment, A Guidebook for Employers, Volume 1,* U.S. Government Printing Office: 1974-559-400. In its Foreword, at page 1, EEOC states in part:

> "Equal Employment opportunity is the law. It is mandated by Federal, State and local legislation, Presidential Executive Orders and definitive court decisions.
>
> "However, there remains a need to communicate to employers why and how equal employment opportunity

[3] Affirmative action plans which, in one way or another, require or promote hiring and promotion of minorities, especially blacks, are common. Employers doing more than a minimum amount of business with the federal government are required by the Department of Labor to establish minority hiring goals and timetables, Executive Order No. 11246, 3 C.F.R. 169; 41 C.F.R. § 60-2.12; *see Contractor's Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir., 1971), *cert. den.*, 404 U.S. 854. The Equal Employment Opportunity Commission requires employers to report the number of minority and white employees, 29 C.F.R. § 1602.7, and, along with the Justice Department, views specific hiring and utilization goals as a proper basis for settling discrimination claims by consent decree. *United States* v. *Allegheny-Ludlum Industries*, 517 F.2d 826, 835 (5th Cir., 1975); *EEOC* v. *American Tel. & Tel. Co.*, 8 FEP 431:73, 74 (1973).

Numerous federal courts have imposed hiring quotas favoring minorities as relief for past patterns and practices of racial discrimination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1026-28 (1st Cir., 1974), *cert. den.*, 421 U.S. 910 (1975); *Carter* v. *Gallagher*, 452 F.2d 315, 331 (8th Cir., 1972); *United States* v. *Ironworkers, Local 86*, 443 F.2d 544, 553-54 (9th Cir., 1971), *cert. den.*, 404 U.S. 984; *United States* v. *Central Motor Lines, Inc.*, 325 F. Supp. 478, 479 (W.D. N.C., 1970). *See Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir., 1974), *cert. den.*, 419 U.S. 895 (1975).

> usually requires positive, *affirmative action* beyond establishment of neutral 'nondiscriminatory' and 'merit-hiring' policies."

The obvious purpose of these "affirmative action" programs—in whatever form they may be cast—is to quicken the pace at which previously disadvantaged minorities may achieve their rightful place in the nation's economic life. *EEOC Affirmative Action Guidebook, supra,* at 3. Without them, the rate of progress to racial equality in employment would be painfully slow. If hiring, promotion, or discharge decisions cannot lawfully be affected to even the slightest degree by racial considerations, if these decisions must be made in all cases on the basis of merit alone, those historically disadvantaged by the shackles of racial discrimination will for years to come still have steeper hills to climb than whites. The EEOC, in its *Affirmative Action Guidebook,* and elsewhere, has made it clear that it does not understand Title VII to require strict racial neutrality in all employment decisions, and its role in the administration of the Act entitles its interpretation to "great deference." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971).

"Affirmative action" is not universally acclaimed. Like most if not all social programs which rock the status quo, it can be, and no doubt some have been, more abusive and destructive than constructive.[4] We are not suggesting that all forms of "reverse discrimination" would be saved if promoted under the banner of "affirmative action." Not at all! The essence of workable and acceptable programs

[4] A case recently filed in the United States District Court for the Northern District of Ohio, Eastern Division, may illustrate this dramatically. *Malone* v. *Hall and Shippers Dispatch, Inc.,* No. C75-1084. There a motor carrier is seeking to recover substantial money damages from the United States, alleging that a serious accident was caused by an incompetent driver the company was compelled to hire by the EEOC.

must be reasonableness, fundamental fairness, and common sense.[5]

Perhaps the key may be the word "invidious." It is not to be found in the text of the Civil Rights Act of 1964, but it appears regularly in the opinions of this and other courts. *Griggs* v. *Duke Power Co., supra,* at 431; *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967); *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 457-58, 459, 461 (1975).

The customary context in which it appears is a statement to the effect that Title VII "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights." *Johnson* v. *Railway Express Agency, Inc., supra,* at 457-58.

Perhaps "invidious" has no significant meaning of its own. It may be that it has become a phrase of art with no real substance except to imply that all racial discrimination is "invidious." But the manner and context in which the word has been used convince us otherwise. We believe it does mean something. Mr. Justice Douglas seemed to be saying as much in his opinion in *DeFunis* v. *Odegaard,* 416 U.S. 312, 344 (1974):

> ". . . [O]ur task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause—the protection against racial discrimination—there has been an 'invidious' discrimination."

Although the majority thought *DeFunis* moot by the time it reached the Court, Mr. Justice Douglas' views are instructive even though stated by way of dissent. We also

[5] Nor are we to be understood as suggesting that "affirmative action" as such has any place in the discipline area. It does not. We refer to it only to illustrate the ultimate weakness of the position that *all* employment decisions must as a matter of law be absolutely racially neutral.

recognize that his position was expressed in terms of 14th Amendment rather than Title VII considerations, but this is a distinction without a difference in the context of the instant case. *United States* v. *Chesterfield County School Dist.*, 484 F.2d 70, 73 (4th Cir., 1973), and cases there cited; *but see Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir., 1975); *Tyler* v. *Vickery*, 517 F.2d 1089, 1097-99 (5th Cir., 1975). In effect, he said that although the admissions procedures adopted by the University of Washington Law School did accord minorities an advantage not enjoyed by whites, they were not unlawful because DeFunis was not "invidiously discriminated against because of his race." 416 U.S. at 344.

This view, we know, opens the door to a host of difficult problems. What is "invidious" and what is not? A comprehensive definition which might resolve all the problems which will surely arise in this area in the years and decades ahead is not possible. As various factual situations may be presented to the courts, a workable standard will gradually evolve.

Certain basic guidelines are possible now. Only extraordinary circumstances could take discrimination against a minority out of the "invidious" class. On the other hand, while across-the-board discrimination *in favor of* minorities could never be condoned consistent with Title VII and the evident intent of Congress, such discrimination under special circumstances or in isolated cases which cannot reasonably be said to burden whites as a class unduly, may not be "invidious" and may be acceptable at this time in our history. Thus, reasonable "affirmative action" programs would be preserved in order to remedy the wrongs of the past, and isolated cases like that at bar, in which a black

man may have been given a "break", would not run afoul of Title VII.

Troublesome as this might appear to be in terms of administration, it would be preferable, we suggest, to that view of Title VII which would demand absolute racial neutrality in every conceivable situation. If demonstrated competence alone is to be the standard, how fast will minorities make their way into the work force, what will be the pace of their advancement, and how many will be admitted in the next decade to our colleges, universities, and graduate schools?

Absolute neutrality will surely also generate a whole new wave of litigation. For example, consider the experience of Sears, Roebuck. In 1974, it was one of the primary targets of the Equal Employment Opportunity Commission. *Dun's Review*, June 1974, p. 85. Presumably to facilitate the entry of blacks and other minorities into its employment ranks it instituted "Sears Summer Internship Program for Minority Students." One Alan Roy Hollander, a white, applied for participation in the program. His application was, of course, rejected. It seems that he first sought Title VII relief from the EEOC but gave up on that avenue for some reason.[6] Instead he chose to sue *pro se* under the Civil Rights Act of 1866, 42 U.S.C. § 1981. And he "won" —that is to say his action survived a motion to dismiss by Sears in which it urged that § 1981 confers no right to sue on white persons. The United States District Court for the District of Connecticut ruled to the contrary. *Hollander* v. *Sears, Roebuck & Co.*, 392 F.Supp. 90 (March 27, 1975). The case is presently awaiting trial.

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[6] An effort to secure relief from the Connecticut Commission on Human Rights and Opportunities was unsuccessful.

What is one in Sears' position—and that actually means almost every employer in the country—to do? If it promotes a program designed to assist minorities, it may get a pat on the head from the EEOC, but it may also be sued. With successful litigants reasonably confident that their attorney's fees will be paid, 42 U.S.C. § 2000e-5(k), suits will be filed in every conceivable situation. An alternative course would be to decline to have anything to do with "affirmative action," but that would provoke the wrath of the EEOC. The only sensible answer to this dilemma is for this Court to construe Title VII along the lines we have suggested. Meaningful "equality" for disadvantaged minorities today may require some fair and reasonable measure of advantage over the majority who enjoyed an overwhelming advantage for two centuries or more. If we accorded some slight advantage to Mr. Jackson, the Petitioners in this case were not unfairly or unreasonably disadvantaged thereby and we did not violate Title VII.

II. A DISMISSED WHITE EMPLOYEE CHARGED WITH MISAPPROPRIATION OF COMPANY PROPERTY LACKS STANDING TO SUE ON GROUNDS OF RACIAL DISCRIMINATION UNDER THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

While the broad question of a white employee's standing to sue under Title VII is not presented in this case, the question of whether the protection from racial discrimination of 42 U.S.C. § 1981 extends to white persons is squarely presented. The use of § 1981 as a means of vindicating employment rights of whites is novel to this Court for this application was not altogether apparent in 1866 and it is only recently that attempts to extend § 1981 in this fashion have been made. Of courts considering this question, at least five have indicated whites have no standing to sue under § 1981 while we are aware of only three courts which

have held to the contrary.[7] The Civil Rights Act of 1866 which was the basis for § 1981, was enacted to implement the Thirteenth Amendment, the purpose of which was to eliminate slavery and the vestiges of that condition previously imposed upon the black. An examination of the statute itself and the pertinent decisions reveals that the import of § 1981 was not to protect whites from racial discrimination but to protect blacks, and to afford blacks, not whites, with an appropriate remedy.

A. White Persons Have No Standing to Maintain an Action Under § 1981

1. The language of § 1981 directly supports the proposition that only blacks are protected against racial discrimination

It is well established that where the language of a statute is plain and unambiguous, it is the duty of the courts to enforce it as written. *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *Commissioner of Immigration of Port of New York* v. *Gottlieb,* 265 U.S. 310, 314 (1924). The language of § 1981 is clear and obvious in its prescription of a remedy for blacks against racial discrimination. It is equally clear

[7] The following cases support the view that whites do not have standing under § 1981: *Perkins* v. *Banster,* 190 F. Supp. 98 (D. Md., 1960) *aff'd,* 285 F.2d 426 (4th Cir., 1960); *Ripp* v. *Dobbs Houses, Inc.,* 366 F. Supp. 205 (N.D. Ala., 1973); *Bale* v. *United Steelworkers of America,* 6 EPD ¶ 8948, p. 6036, 6038 (W.D. Pa., 1973), *aff'd,* 503 F.2d 1398 (3rd Cir., 1974); *League of Academic Women* v. *Regents of the University of California,* 343 F. Supp. 636, 638-39 (N.D. Calif., 1972); *Kurylas* v. *Department of Agriculture,* 373 F. Supp. 1072, 1075-76 (D.D.C., 1974), *aff'd,* 514 F.2d 894 (D.C. Cir., 1975). Others holding to the contrary are: *Hollander* v. *Sears, Roebuck & Co.,* 392 F. Supp. 90 (D. Conn., 1975); *Central Presbyterian Church* v. *Black Liberation Front,* 303 F. Supp. 894 (E.D. Mo., 1969); *Gannon* v. *Action,* 303 F. Supp. 1240 (E.D. Mo., 1969), *aff'd on other grounds,* 450 F.2d 1227 (8th Cir., 1971); *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F. Supp. 577 (M.D. Ala., 1973). Both *Gannon* and *Central Presbyterian Church* were decided in the same court by Judge Meredith.

and obvious that similar protection for whites was not within the contemplation of Congress.

§ 1981 reads as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Emphasis supplied.)

Thus, it explicitly confirms that "all persons" shall have the same rights as those "enjoyed by white citizens." To read the word "persons" to include whites would confirm for them the enjoyment of rights they already possessed. This doesn't make any sense and a reading of the statute that reaches such a result should be avoided. *United States v. American Trucking Ass'n,* 310 U.S. 534, 543 (1940).

2. The historical setting and legislative history of the Civil Rights Act of 1866 indicate that § 1981 was intended to protect only blacks.

In view of the clarity of language of § 1981, there is no need to resort to legislative history to determine its meaning. But if its background is examined, we think it is quite clear that Congress intended to protect only blacks.

The passage of the Civil Rights Act of 1866 in the aftermath of the Civil War was intended to secure more than physical freedom for the black inhabitants of this country. It was enacted pursuant to the authority of Section 2 of the Thirteenth Amendment which empowered Congress to pass appropriate legislation to eliminate slavery, involuntary servitude and the badges and incidences of those conditions throughout the United States. The fundamental purpose was to eliminate all possible remaining vestiges of black slavery.

There is, we know, language in the legislative history that tends to support the view that whites were accorded protection against racial discrimination. But there is also significant language in the same legislative history to demonstrate the sole purpose of the Civil Rights Act was to assist the newly freed black.

The oft-cited Senator Trumbull, one of the sponsors of the measure, made the point that the legislation was intended to benefit blacks. Just prior to his introduction of the bill (S. 61), Trumbull urged its early enactment—

> "for the purpose of quieting apprehensions in the minds of many friends of freedom lest by local legislation or a prevailing public sentiment in some of the States persons of the African race should continue to be oppressed and in fact deprived of their freedom . . . ." Cong. Globe, 39th Cong., 1st Sess. 77 (1866).

Further, in reviewing the abuses that had been heaped upon the black, Senator Trumbull declared:

> "The purpose of the bill [S. 61] under consideration is to destroy all *those* discriminations, and to carry into effect the constitutional amendment." *Id.* at 474. (Emphasis added.)

That the protection of blacks was foremost in the minds of the draftsmen of this legislation is reflected elsewhere in the Congressional record. Senator Lane of Indiana felt called upon to defend the bill and the propriety of using federal authority to deal with the white man who would invoke local prejudice against the black. In doing so he commented upon the purpose of Senate Bill No. 61:

> "I think then, that the provisions of this bill are admirably calculated to secure to these colored persons their rights under the constitutional amendment." *Id.* at 603.

Representative Thayer of Pennsylvania was specifically concerned with the condition of the black, and advocated the passage of the bill for that reason:

> "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure [the Thirteenth Amendment]. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this country .... The events of the last four years ... have changed [a] large class of people ... from a condition of slavery to that of freedom. The practical question now to be decided is whether they shall be in fact freemen. It is whether they shall have the benefit of this great charter of liberty given to them by the American people." *Id.* at 1151.

Senator Howard of Michigan declared the object of the bill before the Senate:

> "It is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else." *Id.* at 504.

There are many other references to the conditions of the blacks at that time. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 427-28 (1968). The concern was for them, not for white men! The context of the Act and the primary concern of Congress for blacks by far overshadow any incidental comments about protecting whites one may find. At best, the legislative history of this Act on this point is ambiguous and should not be relied upon in the face of its plain wording.

3. The better view developed in a number of lower court decisions is that § 1981 does not provide a cause of action for whites to redress alleged racial discrimination

Upon a careful consideration of the wording of the statute and pertinent decisions, the court below concluded that a white person cannot sue under § 1981. We think it was correct.

A number of courts in addition to the Fifth Circuit have agreed that it would be contrary to the plain meaning of § 1981 to extend its coverage to whites. *Ripp* v. *Dobbs Houses, Inc.*, 366 F. Supp. 205, 211 (N.D. Ala., 1973); *Perkins* v. *Banster*, 190 F. Supp. 98, 99 (D. Md., 1960), *aff'd*, 285 F.2d 426 (4th Cir., 1960).[8]

In *Ripp* v. *Dobbs Houses, Inc., supra*, an action was filed by a white complaining of an allegedly illegal discharge by his employer because of his association with fellow employees of the black race. The court turned him away:

> "Plaintiff seeks to utilize this statute, which is not available to 'white citizens,' to support this Court's jurisdiction to hear his freedom of association claims. The Court will decline plaintiff's invitation to extend this statute beyond its reach.
>
> "Even in its resurrected state, Civil Rights Act of 1866 has been generally limited to its unequivocal terms. [citing *Perkins* v. *Banster, supra*] Attempts to expand Section 1981 beyond its terms have generally met with failure. ...
>
> "In summary, the Court concludes that a white plaintiff cannot rely upon 42 U.S.C. § 1981 to press claims

[8] *See Kurylas* v. *Department of Agriculture*, 373 F. Supp. 1072, 1075-76 (D.D.C., 1974), *aff'd*, 514 F.2d 894 (D.C. Cir., 1975); *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829, 838, 840 (N.D. Calif., 1973); *League of Academic Women* v. *Regents of the University of California*, 343 F. Supp. 636, 638-39 (N.D. Calif., 1972).

with respect to his private employment." 366 F. Supp. at 211.

In *Bale* v. *United Steelworkers of America*, 6 EPD ¶ 8948, p. 6036 (W.D. Pa., 1973), *aff'd*, 503 F.2d 1398 (3rd Cir., 1974), the question of § 1981 protection of whites was raised again. A white worker complaining of racial discrimination by his employer and his union, was held not to have presented a cause of action, with the court specifically finding:

> "There is no jurisdiction to maintain this suit under the Civil Rights Act of 1866, 42 U.S.C. 1981, there being no allegation of racial discrimination against one who is not a white citizen." 6 EPD at 6038.

Petitioners mistakenly rely on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), in which Sullivan, a white, alleged he was wrongfully deprived of his membership in a local community organization because of his activities in leasing his property and transferring a community organization membership to one, T. R. Freeman, a black. The two of them sued under 42 U.S.C. § 1982, a sister statute of § 1981. The Court permitted Sullivan to maintain an action under § 1982 because he was attempting to vindicate the rights of minorities, not the rights of whites:

> "We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows* v. *Jackson*, 346 U.S. 249, 259, that the white owner is at times *'the only effective adversary'* of the unlawful restrictive covenant." 396 U.S. at 237. (Emphasis supplied.)

The intention of this Court was thus clearly expressed—whites had standing in this case because they were the only

"effective adversary" to contest racial discrimination against black persons.

In *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973), as stated by Petitioners, this Court affirmed the standing of a white person to sue pursuant to § 1981 and § 1982 where the claim was based upon racial discrimination against black persons. There, a white plaintiff brought suit to vindicate the rights of a black acquaintance who had been barred by the defendant Association from use of the local swimming pool.

This Court should focus upon the nature of the underlying discrimination in those cases—discrimination against blacks. They do not support an expansion of § 1981 to protect whites in Petitioners' situation. On the contrary, they strongly imply that § 1981 applies only to discrimination against blacks.

In the present case, whites are claiming other whites have discriminated against them on the basis of their race. That was not the situation in the cases cited by Petitioners. For a white to bring a claim pursuant to § 1981 under those cases, standing would depend upon his demonstration that his claim was actually based upon racial discrimination against blacks or that his action under § 1981 was an effort to vindicate the rights of the blacks, and that no other means to vindicate those rights were available.

Petitioners also rely upon a few unique cases that have permitted whites to maintain a § 1981 action. *Gannon* v. *Action*, 303 F. Supp. 1240 (E.D. Mo., 1969), *aff'd on other grounds*, 450 F.2d 1227 (8th Cir., 1971); *Central Presbyterian Church* v. *Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo., 1969); and *WRMA Broadcasting Co.* v. *Hawthorne*, 365 F. Supp. 577 (M.D. Ala., 1973). It is our view that these cases are incorrect and aberrations from the

longer line of authority refusing to permit such actions. It should also be called to this Court's attention that while the Eighth Circuit had an opportunity to decide the question of § 1981 jurisdiction in *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir., 1971), it declined to affirm or deny the decision of the lower court and decided the case on other grounds.

Petitioners place primary reliance upon *Hollander* v. *Sears, Roebuck & Co.*, 392 F. Supp. 90 (D. Conn., 1975). In that case, § 1981 was read as providing a cause of action for whites as well as non-whites. The court recognized there was support for the view that § 1981 did not provide a cause of action for whites, but chose to disagree with case law to that effect on the basis that the statute was ambiguous and subject to interpretation. In *Hollander*, the court ignored the mandates of statutory construction in interpreting § 1981 by resorting to judicial interpretation of a statute clear on its face. The court's use of legislative history was inappropriate and moreover incorrect for the history of the statute as discussed in Section II(A)2 of this Brief is at best ambiguous.

Section 1981 does not afford whites any protection from racial discrimination. Nor is there any compelling reason to extend it to white persons. The availability of remedies for discrimination in employment existing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and the vast array of state laws adequately protect white persons.

B. Even If the Court Determines White Persons Have Standing to Invoke the Protection of § 1981, These Petitioners Have Failed to State a Cause of Action Under This Section

We submit that if this Court decides to permit whites to bring an action under § 1981, the dismissal of Petitioners'

action was proper for they failed to state a claim thereunder. As pointed out in our discussion of Title VII, a complaint must state more than superficial allegations of racial discrimination, but most allege specific, concrete facts to support a claim whether under Title VII or under § 1981. In this case, the Court is presented with the situation where the Petitioners were dismissed for a theft which they did not deny. Their complaint merely alleges that a black employee who was charged with theft, was not discharged. For the Court to allow whites to maintain a § 1981 action without pleading more, the Court would throw wide the door to innumerable and frequently unmeritorious lawsuits.

In determining what is needed to state a cause of action under § 1981, it may be instructive for this Court to examine the decision of the court in *Schoonfeld* v. *Mayor and City Council*, 399 F. Supp. 1068 (D. Md., 1975), when faced with a problem similar to the case at bar.

In *Schoonfeld*, a white former city jail warden, Schoonfeld, claimed he was discharged by his employers because he was white and because defendants wished to replace him with a black. Schoonfeld thereafter attempted to maintain an action under 42 U.S.C. § 1985(3), a statute similar in purpose to 42 U.S.C. § 1981. In that case, the court considered the standards necessary for a *white* plaintiff to maintain an action. It noted that mere allegations of discrimination are insufficient, and enumerated the complaint's deficiencies:

> "In the instant case the facts alleged do not show any class-based discrimination. Unlike *Action* v. *Gannon*, *supra*, there is no allegation of any ongoing discriminatory activity, nor is there any allegation of a systematic pattern of discrimination . . .
>
> "This is not a case of discharge of a white public official by an all-black board. . . ." *Id.* at 1086.

The factors isolated by the court as necessary to a complaint of racial discrimination were lacking in *Schoonfeld* and are lacking in the case of the Petitioners. They do not claim that the charge of misappropriation was in any sense a pretext by us in order to discharge and punish them for their status as white men. Rather, the only allegation is that a black was treated differently from themselves.

The Maryland District Court recognized that there was no merit in allowing a white to advance a claim based upon his dismissal by a basically white group of public officials, where the replacement was a white selected by racially neutral procedures. In order to avoid such frivolous claims, this Court should similarly recognize conclusory allegations are not enough and that specific facts to support an allegation of discrimination are necessary to set forth a claim under § 1981.

This Court may establish different criteria for an action by a white person as opposed to a black under § 1981. If this Court wishes to extend § 1981, it should do so only insofar as any benefits of such extension outweigh the significant detriment to an employer's affirmative action efforts as previously discussed in this Brief regarding Title VII. There is little reason for an extension of § 1981 to protect the white Petitioners in the circumstances of this case.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals under review was correct. Accordingly, this Court should affirm that decision. If it is determined that white persons have standing to invoke 42 U.S.C. § 1981, we suggest that this Court affirm the result reached in the court below on the ground that Petitioners failed to state a claim upon which relief could be granted.

Respectfully submitted,

RONALD A. LANE
SHELLEY J. VENICK
C. GEORGE NIEBANK, JR.
80 East Jackson Boulevard
Chicago, Illinois 60604
(312) 427-4900

Attorneys for Respondent
Santa Fe Trail
Transportation Company

BENJAMIN R. POWEL
McLEOD, ALEXANDER, POWEL
& APFFEL, INC.
808 Sealy & Smith Professional
Building
200 University Boulevard
Galveston, Texas 77550

Of Counsel

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NO. 75-260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION COMPANY ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT, LOCAL NO. 988, TEAMSTERS, FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES

CHRIS DIXIE
JAMES P. WOLF
Suite 401, 609 Fannin Street
Houston, Texas 77002
713/223-4444
Attorneys for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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BRIEF OF RESPONDENT, LOCAL NO. 988, TEAMSTERS, FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES

QUESTIONS PRESENTED

1. Whether an employer's dismissal of two white employees for serious theft of company property on the job without dismissing a similiarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964 against their union for acquiescing therein.

2. Whether two white employees who were dismissed for theft of company property on the job have standing to sue under 42 U.S.C. §1981 because they were not accorded the same rights as a black employee who was similarly charged but not dismissed.

STATEMENT OF THE CASE

The District Court dismissed this case after more than two and one-half years of pretrial activity, including motions to dismiss, pretrial conferences, and discovery proceedings. During this period, the District Court filed three memorandum opinions, on January 4, 1974, May 2, 1974, and June 13, 1974, in which it interpreted Petitioners' pleadings and contentions to be that Petitioners were "equally guilty" of theft of the employer's property in comparison with a Negro employee who was not discharged (Appendix to Petition, p. 36) and that

> "[t]he pleadings of plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged". Appendix to Petition, pp. 33 and 28.

The district Court was also advised by the parties that Petitioner McDonald's discharge was taken to arbitration by the Union where the discharge was upheld, although the Court properly declined to accord finality to the arbitration award for Title VII purposes. (Appendix to Petition, pp. 27 and 32; see also Petitioners' Brief in the Court of Appeals, p. 4)[1]

The posture of the case below does not, in this Respondent's view, accommodate the claim of Petitioners that they were not afforded an opportunity by the District

1. Petitioners' Brief in the Court of Appeals states at page 4: "On October 2, 1970, L. N. McDonald filed a grievance with Local Union No. 988, and a hearing on the grievance was held before the Southern Area Multi-State Grievance Committee commencing at 9:00 A.M., Monday, October 10, 1970, at the Ramada Inn, West Beach, Biloxi, Mississippi, Case No. 58."

Court to offer evidence that they were innocent of the acusations. Petitioners did not by requesting leave to sharpen their pleadings or by any other means advise the District Court or the Court of Appeals that the gravamen of their claim was innocence or that the District Court misunderstood their posture.

In the view of this Respondent, therefore, this appeal comes to the Supreme Court as a case involving a claim by two white persons that they and a Negro employee were "charged" with theft of the employer's property, that all three were guilty, but the employer imposed disparate discipline against the two white employees in comparison to the Negro employee involved in the affair.[2]

Theft of company property of over $200 is a felony under the Texas Penal Code.[3]

As to this Union Respondent, the allegation was that it "acquiesced" in the "more severe disciplinary action against [plaintiffs] because of their race, Caucasian, than against their negro counterpart." App. 38-39; 40.

District Court Rulings

In the Court's Memorandum Opinion of January 4, 1974 the Court said:

2. The theft charge involved 10 cases of anti-freeze which Petitioner McDonald was accused of stealing from trailer 20438. McDonald stated in his grievance that a shipping clerk at "S.M.S." told him to do what he like with "some anti-freeze over on trailer 20438," that he so informed Petitioner Laird, "my supervisor," and that Laird told him "what to do with this anti-freeze." See Appendix to Petition, pp. 50-51.

3. Texas Penal Code Article 31.03, Vernon's Texas Codes Annoted-Penal, provides that theft of property valued at $200 or more is "a felony of the third degree" which is punishable by confinement in the State penitentiary for not less than 2 nor more than 10 years under Article 12.34 of the Penal Code.

"This Court is also concerned with whether the complaint states a claim upon which relief can be granted. Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 93 S.Ct. 1817 (1973). Assuming, arguendo, that the plaintiffs were discharged because they were white while an equally guilty Negro employee was retained because of his race, this Court still questions whether the plaintiffs have stated a claim. (This Court assumes for present purposes that the Negro employee had a similar work record and similar degree of culpability in the offense.) This point has received inadequate attention in the pleadings filed by the parties and has not been briefed. App. 94

Later, in the Memorandum Opinions of May 2, 1974 and June 13, 1974 the Court said:

"Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

'Assuming, but not deciding that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).'

"The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly

charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

"IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice." App. 107; App. 117

The District Court properly dismissed Petitioner Laird's Title VII action against the union because Laird filed no charges against the union before the E.E.O.C. App. 114-115. (Laird was a foreman not covered by the labor contract.)

Court of Appeals Rulings

The Court of Appeals affirmed in these words:

"[2] We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C.A. §2000e et seq. There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939); *Nix v. NLRB*, 418 F.2d 1001, 1006 (5th Cir. 1969); *AHI Machine Tool & Die, Inc. v. NLRB*, 432 F.2d 190 (6th Cir. 1970). App. 121-122

SUMMARY OF ARGUMENT

1. The courts below properly construed *McDonald Douglas Corp. v. Green*, 411 U.S. 792, to be inapplicable to punishment for a serious theft of substantial company property on the job. As a matter of public policy as well as common sense it should not be concluded absent clear evidence that Congress intended to grant to an employee who is established to be guilty of such serious theft the right to demand of a union or a company that the punishment be so administered that the employer must discharge no one or every one involved in the theft episode. Such a rule would not advance the purposes of Title VII and would be counterproductive.

2. As to the claim under 42 U.S.C. § 1981 the statute does not apply to a claim by a white person that he be treated equally with a black person. Contrary to the analysis of the legislative history of the Civil Rights Act of 1866 submitted by Petitioners and their supporting amici curiae, the legislative history shows that Congress intended to legislate in favor of freedmen, and in the process for other non-whites, to secure to them certain rights to whatever extent those rights were "enjoyed by white citizens." There is no constitutional problem. It was not incumbent upon Congress to legislate on behalf of white persons in the process of implementing the Thirteenth Amendment. A remedial statute may aim at the evil to be corrected.

ARGUMENT

I.

AN EMPLOYEE WHO IS GUILTY OF SERIOUS THEFT OF COMPANY PROPERTY ON THE JOB DOES NOT PRESENT A CLAIM UNDER TITLE VII BY OBJECTING TO HIS DISCHARGE ON THE GROUND THAT ANOTHER EMPLOYEE OF ANOTHER RACE WHO WAS EQUALLY CULPABLE WAS NOT DISCHARGED.

There is no doubt that white employees under Title VII have rights identical to those of black employees to be free of discrimination. The statute is couched in terms of hiring, discharging, or otherwise discriminating against any individual because of his race. No one contended otherwise and neither court below was confused on this point. Nevertheless, it is entirely appropriate for this Court to articulate the identical right of access to the statute which is available to white citizens. Union Respondent is in accord with the discussion of this subject in Petitioners' Brief pp. 8-16.

Respondent Union requests affirmance of the judgment under Title VII on the limited grounds stated below. This limited position relates to the claimed right of an employee who is guilty of serious theft of company property on the job to receive only that punishment which is equal to that of an employee of another race. More specifically, this respondent requests affirmance on the ground that a union's duty under Title VII does not obligate it to achieve or demand that an employer either discharge no employee or discharge all employees similarly situated.

The District Judge, Carl O. Bue, Jr., one of the best in the country, dismissed this case without motion or pleading by either defendant related to this point. We suggest that the District Court's reaction to the case was entirely appropriate.

Respondent suggests that serious crime in the form of substantial theft is an unworthy predicate for compulsory egalitarian punishment under Title VII.

A union is not in position to insist that an employer retain in its employ every person found to be guilty of serious theft especially in the transportation industry where employees must be entrusted with possession of or access to goods in transit. (Theft of interstate shipments by common carrier are punishable by fine up to $5,000 or imprisonment up to 10 years if the value of the goods exceeds $100. 18 U.S.C. §659). Rather, a union's principal legitimate function is to establish innocence or lack of proof or to seek mitigation of punishment. But, also, a union is not in the business of causing employees to be fired. If in this and similar cases a union is given the duty to demand that the employer discharge all or none in obedience to Title VII the inevitable result will be to cause the employer to discharge everyone arguably in similar circumstances in order to avoid the burden of Title VII litigation or financial exposure under it.

The purpose of Title VII is "to assure equality of job opportunities and to eliminate those practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens". *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973). But discipline for established serious theft of an employer's property is not a proper occasion for the offending em-

ployee to demand absolute equality in punishment. For public policy reasons, equal punishment for serious theft on the job should not be held a requirement of Title VII unless the improbable is positively clear, namely, that Congress intended to confer equal rights upon all races to participate in stealing. Selective punishment of an employee for a particular offense of serious theft is not really an "artificial, arbitrary or unreasonable barrier to employment" at least if no pattern of employer discrimination is present.

Title VII like any other statute should be applied with due regard to other public policy. Thus, the statutory right under §704(a) of Title VII to be free of reprisal for efforts to oppose unlawful discrimination must yield to the orderly bargaining processes of the National Labor Relations Act. *Emporium Capwell v. Western Addition Community Organization; NLRB v. Western Addition Community Organization*, 95 S.Ct. 977 (1975).

In other areas: the normal right to strike under the National Labor Relations Act must yield in the case of seamen aboard ship to the law of mutiny. *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942). The normal operation of the preemption doctrine under the National Labor Relations Act must yield, for policy reasons, to the rights of states to prevent or redress violence or breaches of the peace. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959).

Undoubtedly, *McDonnel Douglas Corp. v. Green, supra*, establishes that even unlawful conduct such as a "stall in" —a misdemeanor—may not be used by an employer as a discriminatory pretext to refuse rehire to a minority employee, but a main thrust of the case was to make clear

that such unlawful activity against an employer is adequate basis for refusal to rehire:

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate unlawful activity against it." 401 U.S. at 803

The present case is a long step further removed from Title VII because an employee's crime of serious theft against an employer is totally indefensible and inconsistent with continuation of employment absent employer consent. The "stall-in" in *McDonnell,* while illegal, did not directly relate to fitness for employment and was an excess in, but closely related to, protected protest activity. There is a marked difference in the ethics and morality of the "stall in" there compared to the serious theft on the job here. *McDonnell* is primarily an exposition of the order and allocation of proof in a private, non-class action case. The opinion specifies in footnote 13 that its specifications are not necessarily applicable in every respect to differing factual situations.

The portion of the opinion which seems to the Respondent to be inapplicable to this case is the following:

> "Petitioner may justifiably refuse to rehire one who has engaged in unlawful disruptive acts, but only if this criterion is applied alike to members of all races." 411 U.S. 804

If this passage applies to a single case of serious theft so that an employer must discharge either no one or everyone involved, it imposes a burden on the employer which is irrelevant to Title VII as well as an irrational duty upon the union. The union, instead of directing

its efforts to do the best it properly can do for all employees is put to it to risk of forcing the employer to refuse leniency for anyone. As in this case, the result would truly turn the blade backward. It bears repeating that employers would be induced to apply maximum punishment to everyone arguably involved in an episode of theft in order to reach some employee who, it feels, must be given maximum punishment.

Evidently, the Court of Appeals felt that *NLRB v. Fansteel Metallurigcal Corp.,* 306 U.S. 240 (1939) which was seemingly followed by the Court in *McDonnell, supra,* pointed in a different direction involving as it did serious misconduct facts. In *Fansteel,* some, but not all, of the sit-down strikers were discharged while the others were taken back into employment. 306 U.S. at 249. The Court set aside an NLRB order directing reinstatement of the discharged sit-down strikers, saying:

> "The important point is that respondent stood absolved by the conduct of those engaged in the 'sit-down' from any duty to reemploy them, but respondent was nevertheless free to consider the exigencies of its business and to offer reemployment if it chose. In so doing it was simply exercising its normal right to select its employees." 306 U.S. 259

The NLRB in *Fansteel* had ruled that the employer's argument that sit-down strikers could not be reinstated by the Board was undermined by the fact of the employer's acceptance of many sit-down strikers for return to work:

> "Furthermore, in view of the fact that the respondent did take back a large number of the sit-down strikers,

> we find it difficult to believe that respondent's objection on that score is put forward in good faith." 5 N.L.R.B. 930, 2 L.R.R.M. 85, 91.

In conclusion, Respondent union presents a very limited contention in support of the judgment below. It is limited to the isolated case of serious theft of company property on the job, a situation which fortunately does not arise with sufficient frequency to disturb seriously the operation of Title VII. The main concern of Respondent is the exposure to litigation or liability which it may encounter under Title VII when it fails to achieve absolute equality of treatment in this type of case. It is commonplace for uions to compromise or abandon grievances of this particular kind on terms which may differ for various employees. This is true especially where it is obvious that an arbitrator will have very little appetite to reinstate perpetrators of serious theft of company property on the job. If a union can settle such a hard case on terms less than discharge should it be liable because it "acquiesced" in another employee's discharge? The quoted passage from *McDonnell,* supra, unfortunately suggests an affirmative answer. For this reason we submit that the passage is not applicable to this case.

ARGUMENT

II.

42 U.S.C. § 1981 DOES NOT AFFORD TO WHITE PERSONS A CAUSE OF ACTION FOR ALLEGED FAILURE TO ACCORD EQUALITY WITH BLACK PERSONS.

Petitioners and their supporting amici curiae have invited the Court to perform plastic surgery upon the statute.

Frankly, this Respondent and its undersigned counsel have no serious objections. Nevertheless, in the discharge of our duty to the Court we have reviewed the legislative history of the Civil Rights Act of 1866, predecessor of §1981, and have collated relevant items of legislative history which we believe satisfactorily explain the matters relied upon by all adverse parties and which overcome their effect. We submit these for the consideration of the Supreme Court as a part of our professional responsibility to present concrete adversary considerations. We have also come to the firm conclusion that the items presented in support of Petitioner's position do not justify the emasculation of the statute which is requested.

The legislative history of the 1866 Act demonstrates, we believe, that the Reconstruction Congress of 1866 intended to achieve equality for freedmen by securing to them the same rights as are enjoyed by white citizens and by protecting them against pains, penalties or punishments greater than those prescribed for the punishment of white citizens. In the process Congress also provided parity of other non-white citizens with white citizens. The standard against which the rights of non-whites were to be measured was the rights of white citizens. The net result was equality for all, as Congress desired.

The few statements by speakers referred to by Petitioners and their supporters to the effect that the bill provided for the equal rights of all citizens are consistent with the above analysis. On inspection, they are found to be the products of a syllogism that ran like this: The bill makes citizens of freedmen and others who are not citizens; the bill provides that the new citizens will have the same rights and immunities as are enjoyed by whites and provides legal sanctions to protect freedmen in these newly

bestowed rights; *therefore,* the bill provides equality of rights for all citizens. The syllogism is sound but it is also consistent with all the words of the Act as finally passed and with Respondent's view that the Act confers actionable rights only upon non-whites and not upon whites.

First, it should be noted that there is no constitutional problem. The Thirteenth Amendment, in Section 1, pro vides that neither slavery nor involuntary servitute shall exist within this nation. Section 2 provides:

> "Congress shall have power to enforce this article by appropriate legislation."

In the *Civil Rights Cases,* 109 U.S. 3, majority and minority opinions agreed that Section 2 clothed Congress with the power to pass all laws necessary and proper for abolishing "all badges and incidents" of slavery and to eradicate "the last vestiges . . . of a society half slave and half free." *Jones v. Alfred H. Mayer,* 392 U.S. 409, 439, 441 (1968).

It was not incumbent upon Congress to legislate on be half of the dominant white majority as a condition of addresing itself to the vestigial legal and social "burdens and disabilities" of slavery which persisted. The Thirteenth Amendment had converted the slaves into freedmen, but freedmen had been denied the practical ralization of freedom and their legal position had been rendered ambiguous by the recalcitrance of the white majority in the South. It was within the power of Congress to select the specific means of relieving the freedmen of the burdens, disabilities and vestiges of slavery and to assist them to attain and retain equality with other Americans. *Id.* 392 U.S. at 440, 443-44.

Remedies which utilize racial classification for the cure of *de jure* discrimination are appropriate if they are rationally related to the evils to be corrected. *Swann v. Charlotte-Mecklenberg Bd. of Educ.,* 402 U.S. 1, 19-20 (1971); *Louisiana v. United States,* 380 U.S. 145 (1965).

At least so long as the adopted solution resulted in equality for whites and non-whites it was not constitutionally infirm or suspect because it did not also also provide a converse cause of action for white citizens.

Section 1 of Senate Bill 61, as introduced was as follows:

> "There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary ser vitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 71 Cong. Globe 474; see also id. at 211.

The original Section 1 did not contain what later became its first clause which declared citizenship in all native born Americans. It also did not contain the "same right" for every inhabitant *"as is enjoyed by white citizens."* However, Section 2, introduced at the same time

did establish the standard of white citizens' rights. It provided:

> "Any person who under cover of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected any inhabitant of any State or Territory to the deprivation of any right secured or protected by the Act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitute, except as a punishment from crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, is to be deemed guilty of a misdemeanor, and on conviction to be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, or both, in the discretion of the court. (71 Cong. Globe 211)

It is to be noted that Section 2, inartfully drawn, provided criminal penalty for the deprivation of any right secured or protected by the act by any person under color of law, etc., *"on account of* [*the victim's*] *having at any time been held in condition of slavery or involuntary servitude"* or "by reason of his color or race." It also punished criminally the imposition of different punishment, pain or penalty "*than is prescribed for white persons.*" From the very be ginning, therefore, the bill established a standard equal to the legal privileges of white persons at least in some measure. An incongruity was present, however, that Section 2 seemed not to adopt the standard of white citizens' rights in its first phase (*i.e.*, interference with the bestowed af firmative rights of all inhabitants) but it did do so in regulating punishments, pains and penalties. This disparity was corrected in the House which inserted in Section 1

the phrase "as is enjoyed by white citizens." 71 Cong. Globe 1115. This particular change was accepted by the Senate without discussion beyond the exchange between Senators Van Winkle and Trumbull in which the latter stated that the House thought the change was of some importance and that in the opinion of the Senate Judiciary Committee the change did not alter the meaning of the bill. (71 Cong. Globe 1143) But the change did serve to eliminate the incongruity between Sections 1 and 2. As changed, both sections adopted the standard of the legal rights and privileges of white citizens in bestowing and protecting affirmative rights upon all citizens and likewise in regulating the punishments, pains and penalties which may be imposed. In this respect, Sections 1 and 2 were made symmetrical.

All of the amici curiae as well as Petitioners attach critical importance to the cited, rather casual exchange between Senators Van Winkle and Trumbull as a means of obliterating from the statute the vital phrase "as is enjoyed by white citizens" but the colloque is more reasonably interpreted the other way. The House did attach "some importance" to its inserted language according to Senator Trumbull and Sections 1 and 2 were synchronized thereby. Since the standard of white citizens' rights and privileges had been a part of the Senate's Section 2 from the beginning, the statement that the phrase did not alter the meaning of the bill can be just as reasonably interpreted to mean that the standard had been understood all along. We will show that several members of Congress did so understand it.

Likewise, a fragile reed are the remarks of Senator Trumbull on February 2, 1866, the date of first passage

in the Senate (71 Cong. Globe 599), to the effect that the bill applies to and protects white men as well as black men and is not for the benefits of black men exclusively. Here again all briefs supporting Petitioners' position rely heavily upon this item.

We find, however, that these remarks were a part of extemporaneous, impassioned rebuttal at the 11th hour provoked by an equally histrionic performance by Senator Davis in the last hours of debate. Senator Davis had said in part:

> "Yes, sir, here is a law almost eo nomine, made unquestionably for the benefit of the free negro and in violation of the Constitution, and the marshals are required, under the penalty of $1,000 for every instance of defalcation, to execute the process under this void and unconstitutional law, and if they fail to do so the commissioner is authorized by this monstrous and abominable bill to summon every bystander to aid the marshal in the execution of this unconstitutional law, to summon the posse comitatus of the county in which the process is to be executed to aid in it, and, if necessary, to summon the entire Army and Navy of the United States to execute such void process.
>
> "When, sir, was such partiality ever shown for the white man, the sovereign, citizen, and lord of this land—him who made the Government, who won its independence, who established, as he thought, the deep and firm foundations of a free Government in a written Constitution, and whose mission it is to uphold and to defend that Government for himself and for his latest posterity? When was such partial, unjust, and iniquitous legislation devised for the white man who achieved all this good for his country and for the world? Never, never. But the negro and his insane friends bring up now for the first time such monstrous legislation." (71 Cong. Globe 599)

Beyond doubt both gentlemen were agitated and plunged into exaggeration in discharging these oratorical fireworks at the hour of final passage by the Senate on February 2, 1866. But earlier, in formal presentations Senator Trumbull and others, proponents and opponents, had stated and repeated the theme many times that the bill achieved equality by elevating freedmen to the position of white citizens. So far as we can determine, no one said or implied that the bill conferred rights of action upon white citizens.

Indeed, these oratorical fireworks, discharged *before* the House injected the phrase "as is enjoyed by white citizens" should be compared to Senator Trumbull's subsequent formal reply to President Johnson's veto message.

President Johnson's veto message was unambiguous in attributing to both Section 1 and Section 2 the creation of rights for new citizens, not white citizens, and the provision of special protection for the former, not the latter:

> "The first section of the bill also contains an enumeration of the rights to be enjoyed by these classes, so made citizens, 'in every State and Territory in the United States.' These rights are, 'To make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,' and to have 'full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.' So, too, they are made subject to the same punishment, pains, and penalties in common

with white citizens, and to none others. Thus a perfect equality of the white and black races is attempted to be fixed by Federal law, in every State of the Union, over the vast field of State jurisdiction covered by these enumerated rights. In no one of these can any State ever exercise any power of discrimination between the different races.

* * * *

"The object of the second section of the bill is to afford discriminating protection to colored persons in the full enjoyment of all the rights secured to them by the preceding section." (71 Cong. Globe 1679-1680).

President Johnson objected that the bill enumerated the rights of "these classes—so made citizens" to be the same as those "enjoyed by white citizens," thus attempting to fix "perfect equality" by federal law. As to Section 2, he complained of the discriminating protection to colored persons." In reply, Senator Trumbull demurred. He discussed Section 2 thus:

"Can human ingenuity point out wherein that section discriminates in favor of colored persons? It says, in effect, that no one shall subject a colored person to a different punishment than that inflicted on a white person for the same offense. Does that discriminate in favor of the colored person? Why, sir, the very object and effect of the section is to prevent discrimination, and language, it seems to me, could not more plainly express that object and effect. It may be said that it is for the benefit of the black man because he is now in some instances discriminated against by State laws; but that is the case with all remedial statutes. They are for the relief of the persons who need the relief, not for the relief of those who have the right already; and when those

needing the relief obtain it, they stand upon the precise footing of those who do not need the benefit of the law." (71 Cong. Globe 1758).

Further in reply, Senator Trumbull relied upon the phrase "as is enjoyed by white persons":

" 'The details of the bill,' says the President, 'establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race.'

"With what truth this can be said of a bill which declares that the civil rights and the punishment of all races, including, of course, the colored, shall be the same as those 'of white persons,' let an intelligent public judge." (71 Cong. Globe 1760).

Respondent suggests that these formal pronouncements of Senator Trumbull after the bill was in final form are more reliable than the extemporaneous item relied upon by Petitioners and their supporters.

The bill also authorized the President of the United States to employ the army or navy to prevent violations.

"And the President of the United States, or such person as he may empower for that purpose, is to have authority to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary, to prevent the violation and enforce the due execution of the act." (71 Cong. Globe 212)

Senator Trumbull explained these extraordinary provisions as necessary to the effectuation of Section 1, but as we know, Section 2 and the other provisions related expressly

or impliedly only to oppression of freedmen by white persons.

Returning to the original form of the bill, we point out that the bill as introduced also provided a right of removal to federal court for any person or officer sued or prosecuted in state court on account of acts committed under its authority. (71 Cong. Globe 211):

> "and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any such person, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed, by virtue or under color of authority derived from this act, or the act to 'enlarge the powers of the Freedmen's Bureau, such defendant is to have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March 3, 1863." (71 Cong. Globe 211)

Senator Trumbull's opening and formal remarks on January 29th, immediately after presenting the amendmen to declare native born persons of African descent to b "citizens of the United States," stated the purpose of t bill:

> "When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them

> to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment. (71 Cong. Globe 474)

Thus, the purpose of the bill was to protect freedmen from the oppressions of their white oppressors.

Section 2 was described by Senator Trumbull as a protection for freedmen only:

> "This is the valuable section of the bill so far as protecting the rights of *freedmen* is concerned. That they are entitled to be free we know. Being entitled to be free under the Constitution, that we have a right to enact such legislation as will make them free, we believe; and that can only be done by punishing those who undertake to deny them their freedom. When it comes to be understood in all parts of the United States that any person who shall deprive another of any right or subject him to any punishment in consequence of his color or race will expose himself to fine and imprisonment, I think such acts will soon cease." (71 Cong. Globe 475). (Emphasis added).

The last sentence of this passage speaks generally of equality for "any person" but the context as well as the wording of Section 2 as passed confines the sanctions of Section 2 to those who deprive *freedmen* of their rights under the bill.

After reading Section 1, Senator Trumbull declared the following relationship between it and the other sections:

> "This section is the basis of the whole bill. The other provisions of the bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section, and the question will arise, has Congress authority to pass such a bill? Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority." (71 Cong. Globe 474).

The "other provisions of the bill" were designed to punish or overcome white persons' opposition to the implementation of freedmen's equal rights established by the bill. There was no provision in the Act as passed for any vindication of the rights of white persons in relation to those of other persons.

Senator Howard spelled out the proponents' logic that the Thirteenth Amendment made Negroes free and thus entitled them to the rights and the attributes of freedom according to universal understanding of the American people. The bill, he said, was designed to secure to the freedmen the ordinary rights of other freemen, thus:

> "The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?
>
> "Mr. President, I do not understand the bill which is now before us to contemplate anything else but this, that in respect to all civil rights—and those are some of the civil rights which I have just enumerated —there is to be hereafter no distinction between the white race and the black race. It is to secure to these

> men whom we have made free the ordinary rights of a freeman and nothing else." (71 Cong. Globe 504).

This discussion by Senator Howard repeats the syllogism.

Senator Davis, a principal opponent, summarized Sections 1and 2 of the bill thus:

> "The amendment now before the Senate proposes to declare all the negroes in the United States citizens of the United States. The honorable Senator from Illinois plays for three pockets in this bill. The first is, the bill itself, and the first and second sections, essentially, upon which he relies to confer upon the free negroes all the civil rights that under our Government appertain and belong to white citizens." (71 Cong. Globe 523)

No one disputed Davis' statement that that bill merely conferred upon Negroes the rights that "appertain and be long to white citizens" or claimed that it also conferred upon white persons the rights which belonged to blacks.

Senator Guthrie, an opponent, stated that the Thirteenth Amendment had already put Africans on the same footing as whites in relation to civil rights and he argued that the bill did do, and could do, no more:

> "My doctrine is that slavery exists no longer in this country; that it is impossible to exist in the face of that provision; and with slavery fell the laws of all the States providing for slavery—every one of them. I do not see what benefit can arise from repealing them by this bill, because if they are not repealed by the Constitution as amended, this bill could not repeal them. I hope that all the States in which slavery formerly existed will accept that constitu-

> tional provision in good faith. I myself accept it in good faith. Believing that all the laws authorizing slavery have fallen, I have advised the people of Kentucky, and I would advise all the States, to put these Africans upon the same footing that the whites are in relation to civil rights. They have all the rights that were formerly accorded to the free colored population in all the States just as fully this day as they will have after this bill has passed, and they will continue to have them." (71 Cong. Globe 600).

No one would argue that the Thirteenth Amendment conferred rights upon whites.

Senator Guthrie thus interpreted the bill's coverage:

> "Now what is the result of this bill? It enforces through its own officers and through its own agents a prosecution of the citizens who infract it, or commit what they suppose is an infraction of it, in favor of the black population and in favor of the black population only; taking it for granted throughout that the wrong is on the side of the white man alone; making no provision for prosecuting a black man for any crime that he may commit against a white man.
>
> * * *
>
> "The time will not always be that the citizens will be content that the State governments should be interfered with, and that there should be in each State two sets of police officers, one to punish those who commit what they presume to be offenses against the Africans, and another to punish the African for his crimes under the State laws, and that punishment should be made the pretense of prosecuting the white man in your courts. The thing will not work; it ought not to work; and it never should have been introduced here. It is not necessary to secure the freedom of the African." (71 Cong. Globe 601).

The President's authority to utilize the armed forces to prevent violations of the bill was understood thus by Senator Hendricks:

> "The denial of equality to the colored people. Some man disputes the proposition; some judge proposes in his adjudication not to recognize the civil equality of the colored people. Now the military may be called in to prevent the violation of this law." (71 Cong. Globe 601-602).

Senator Lane of Indiana, a proponent of the bill, answered Senator Guthrie with the argument that the admittedly special enumeration and protection of freedmen were necessary because of their special needs:

> "What are the objects sought to be accomplished by this bill? That these freedmen shall be secured in the possession of all the rights, privileges, and immunities of freemen; in other words, that we shall give effect to the proclamation of emancipation and to the constitutional amendment. How else, I ask you, can we give them effect than by doing away with the slave codes of the respective States where slavery was lately tolerated? One of the distinguished Senators from Kentucky [Mr. Guthrie] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.
>
> "But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give the courts of the United

States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts? That is the necessity for this provision." (71 Cong. Globe 602)

* * *

"I think, then, that the provisions of this bill admirably calculated to secure to these colored persons their rights under the constitutional amendment, and I think the provision contained in the last section of the bill more important than any other." (71 Cong. Globe 603)

Senator Wilson, a proponent of the bill, stated its purpose to be the security of "new born rights" of freedmen:

"By the will of the nation freedom and free institutions for all chains and fetters for none, are forever incorporated in the fundamental law of regenerated and united America. Slave codes and auction blocks, chains and fetters and bloodhounds are things of the past, and the chattel stands forth a man with the rights and powers of the freemen. For the better security of these newborn civil rights we are now about to pass the greatest and the grandest act in this series of acts that have enancipated a race and disenthralled a nation." (71 Cong. Globe 603).

Senator Cowan, an opponent, interpreted the bill thus:

"here is an act of Congress which declares that, as to all civil rights and immunities, the negro is to be put upon precisely the same footing as the white man." (71 Cong. Globe 604).

In further reply to Senator Guthrie, Senator Trumbull explained that Section 1 of the bill provided no more than the same rights to the black population which were enjoyed

by the white population and Section 2 would secure Negroes in their rights:

"He says that when slavery was abolished the slave codes in connection with it were abolished, and that he will advise the people of Kentucky to extend the same civil rights to the black population that the white population have. He believes that they are entitled to them. Now, sir, that is all that is provided for by the first section of this bill; he then can have no objection to the first section of the bill, for it simply provides that all the inhabitants of the United States shall be entitled to the same civil rights."

* * * *

"The second section of this bill merely punishes persons who violate what it is admitted they ought not to violate. It does seem to me that there can be no objection to the passage of such a law by Congress on the part of any one who admits that negroes are now entitled to the same rights as white people; and not only that there can be no objection to it but that there is a positive duty upon us to pass such a law if we find discrimination still adhered to in the States where slavery has recently existed." (71 Cong. Globe 605).

Senator Hendricks interpreted the thrust of Section 1 and 2 to be recognition of the rights of blacks to be equal to those of whites:

"This bill is a wasp; its sting is in its tail. Sir, what is the bill? It provides, in the first place, that the civil rights of all men, without regard to color, shall be equal; and, in the second place, that if any man shall violate that principle by his conduct, he may be responsible to the court; that he may be prosecuted criminally and punished for the crime, or be sued in

> a civil action and damages recovered by the party wronged. Is not that broad enough? Do Senators want to go further than this? To recognize the civil rights of the colored people as equal to the civil rights of the white people, I understand to be as far as Senators desire to go; in the language of the Senator from Massachusetts [Mr. Sumner] to place all men upon an equality before the law; and that is proposed in regard to their civil rights." (71 Cong. Globe 601).

All briefs on Petitioners' side rely heavily on Congressman Wilson's statement to the House (71 Cong. Globe 1118) that the government must protect citizens "from the highest to the lowest, from the whitest to the blackest. . . ." The next following comments of Mr. Wilson, however, made clear that the provisions of the bill were intended to deal to the oppression of blacks by whites:

> "It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on 'account of race, color, or previous condition of slavery.' That these things should not be is no answer to the fact of their existence. That the result of the recent war, and the enactment of the measures to which the events of the war naturally led us, have intensified the hate of the controlling class in the insurgent States toward our colored citizens is a fact against which we can neither shut our ears nor close our eyes. Laws barbaric and treatment inhuman are the rewards meted out by our white enemies to our colored friends. We should put a stop to this at once and forever. And yet I would not do this in a way which would deprive a white man of a single right to which he is entitled. I would merely enforce justice for all men; and this is lawful, it is right, and it is our bounden duty.

> "In order to accomplish this end it is necessary to fortify the declaratory portions of this bill with such sanctions as will render it effective. The first of these is found in the second section, ..." (71 Cong. Globe 1118)

Congressman Shellabarger after reading to the House Section 1 as amended by the insertion of the phrase "as is enjoyed by white citizens" explained:

> "But, sir, on yesterday, the honorable gentleman from Pennsylvania [Mr. Broomall]—than whom there is no more candid or just gentleman in the House—treated this measure as though it was a bill simply for the protection of freedmen in their rights for the time being in the late insurrectionary States. That is a great mistake. It applies to every State in the Union, to States which have never been in insurrection, and is to be enforced in every State of the Union, not only for the present but for all future time, or until it shall be repealed by some subsequent act of Congress. It does not expire by virtue of its own limitation; it is intended to be permanent." (71 Cong. Globe 1292).

Thus, the bill was for the protection of *freedmen* and was to be permanent.

Reference has been made at pages 20-21, supra, to the post-veto formal rebuttal by Senator Trumbull to the president's veto message (71 Cong. Globe 1758; 1760). There Senator Trumbull admitted that Section 2 was for the benefit of black persons only and retorted: "That is the case with all remedial statutes. They are for the relief of persons who need the relief, not for the relief of those who have the right already." And further he said "With what truth can this be said (i.e. that the bill provided

for the security of the colored race more than was ever provided for the white) of a bill which declares that the rights and punishment of all races, including, of course, the colored shall be the same as those 'of white persons' let an intelligent public judge." Id. 1760.

In the same post-veto discussion Senator Trumbull was not alone in making analysis to this effect. Senator Davis, in opposition, stated without denial from any one as to the effect of the bill, the following:

> "If I, after the best examination which I can give to this act, was asked for an appropriate title, I would propose to the Senator from Illinois, 'An act to abolish and modify all laws, statutes, ordinances, regulations, and customs throughout the United States, so far as they make any discriminations for the white against the black or colored population thereof; to punish by fine and imprisonment all persons who may enforce such discriminations; and requiring certain officers to institute criminal and civil proceedings against them, at the cost of the United States.'" (71 Cong. Globe 182)
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> * * * *
>
> "In the simulation of imperial will and power in relation to all those most interesting concerns, appertaining to every human being in America, it declares there shall be no discrimination as to persons on account of race, color, or previous condition of slavery. This general and sweeping language is used for a purpose; it is a sort of mask to cover partially the true beneficiaries and objects of the measure, the negro race and their aggrandizement." (Ibid)
>
> * * * *
>
> "I wonder if the legislators who might pass such laws would not cause the negroes, who would be

> by them deprived of civil rights assured to white persons, or have different punishments inflicted upon them from white people who had committed the same offenses, would not have caused those discriminations against negroes; and would not, therefore, come within the purview of the penal section of this bill. The Senator's triumph over the President is but his own self-delusion.
>
> * * * *
>
> "But this measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'" (71 Cong. Globe 183)
>
> * * * *
>
> "But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars are assigned to white persons to the exclusion of negroes and mullatoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality, declares all persons who enforce those distinctions to be criminals against the United States, and subjects them to punishment by fine and imprisonment,

and directs the appointment of legions of officers to prosecute, both penally and civilly, for the benefit of the favored negro race, at the cost of the United States, and puts at the disposal of these officers the posse comitatus, the militia, and the Army and Navy of the United States, to enable them to execute this bold and iniquitous device to revolutionalize the Government and to humiliate and degrade the white population, and especially of the late slave States, to the level of the negro race." (Ibid).

To the same effect were the never denied comments of Senator Johnson in opposition:

> "This first section has another provision. Not satisfied with making the parties citizens and clothing them with all the rights belonging to white citizens by the laws of the States, it says that they 'shall be subject to like punishment, pains, and penalties, and to none other." (71 Cong. Globe 1777).

Another line of discussion that ran through the debate concerned the first sentence of Section 1 of the bill which, in its final form, vested citizenship in all persons born in the United States "not subject to any foreign power, including Indians not taxes." The original form of this first sentence was quite different.

On January 29, 1866, before debate started, Senator Trumbull presented an amendment which ultimately evolved into the first sentence of Section 1. The original form of the proposal was:

> "That all persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery, etc." (71 Cong. Globe 474)

Senator Trumbull's first proposal was aimed directly to benefit only persons of African descent and discloses further the legislative intention behind Section 1 of the bill as well as its other provisions.

Until the passage of the Civil Rights Act of 1866 only the children of white persons became citizens by virtue of birth in the United States. *U. S. v. Wong Kim Ark*, 169 U.S. 649 (1898). Of course, citizenship of Negroes was not possible under the *Dred Scott* decision, 19 How. 393 (1857), as well as other provisions of the original Constitution such as that which counted the Negro population on a three-fifths fractional basis.

The status of other persons of color such as Indians and Chinese was the subject of dispute but, no doubt, the prevalent opinion held that only white children born in the United States were citizens thereof.

Senator Trumbull's proposal for a new first sentence went through several proposed changes to deal with Indians. (71 Cong. Globe 522, 527 and 569) The final form of the first sentence was:

> "Sec. 1. That all persons born in the United States, and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color shall have the same right . . . as enjoyed by white citizens . . ., etc."

In subject re-enactments of the statute, the first sentence was supplanted by the Fourteenth Amendment which in Section 1 reads as follows:

"Section 1. All persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside . . . ."

The legislative discussion leading to the passage of the 1866 Act reveals a common opinion of the members of Congress that white children were citizens of the United States upon birth. Beyond this there was dispute. Proponents of freedmen's rights seemed to believe that the Thirteenth Amendment itself made citizens of former slaves or at least entitled them to the same rights enjoyed by other free men. However, this view was vehemently denied by opponents of the legislation who held to the view that the abolition of slavery did not make citizens of former slaves. These opponents also argued that there was a difference between citizenship in the United States and citizenship of a state. The latter, they claimed, was the exclusive province of the respective states. They went so far as to argue that the bill was unconstitutional in attempting to confer citizenship by general statute and in intruding into state control of state citizenship. All these disputes were settled by the Fourteenth Amendment, obviously, which not only vested citizenship in all persons born in the United States but also vested them with state citizenship.

At the time of the legislative debates, however, it was understood by proponents and opponents alike that white persons already enjoyed citizenship by birth and that the office of the first clause of Section 1 was to confer citizenship by birth upon persons other than white persons, mainly upon freedmen. This was the understanding behind President Johnson's remarks in his veto message that the bill provided citizenship for new classes of persons who

were then vested with rights equal to those enjoyed by white citizens, all of which the President considered improvident. No one so far as we have discovered expressed the thought that the first clause of Section 1 provided anything new for the benefit of white persons born in the United States.

Thus the office of the first clause of Section 1 coincided with the function of the balance of the bill. The entire enactment was structured to alter the status of non-whites by providing them with citizenship by birth, by enumerating the classes of rights which they would enjoy to whatever extent that white persons enjoyed them, and by providing legal sanctions for those who prevented these persons from enjoying the same rights as white persons.

Another factor which somewhat contradicts the construction of the Act sought by Petitioners is the fact that the Act is confined to certain enumerated civil rights but does not include all civil rights or political rights. If Congress really intended the bill to confer rights upon white persons, it was somewhat anomalous to confer upon them fewer rights than they already enjoyed.

Finally, a good argument can be made that the intention of Congress can be divined from the fact that it was proceeding under the second section of the Thirteenth Amendment. Since the Thirteenth Amendment did nothing more than to abolish slavery and involuntary servitude in the United States, it is very doubtful that the Reconstruction Congress of 1866 considered that it had the authority to legislate for the enumeration and protection of rights of white citizens.

Our review of the legislative history of the 1866 Act is necessarily incomplete but it demonstrates that the items

relied upon by Petitioners and their supporters are not significant in light of the whole legislative record and much too fragile to support the striking revision of the language of the statute which is requested. With respect to Petitioners and their supporters, we must say that this Court is being requested to legislate.

District Judge Renfrew correctly capsulated the present situation of §1981 in *League of Academic Women v. Regents,* 343 F. Supp. 636 (N.C. Cal. 1972) thus:

> "Section 1981 was enacted to protect the rights of two groups of people—non-whites and non-citizens who were not afforded equal treatment to white citizens. The standard against which the rights of these individuals must be measured is the rights of white citizens. The change in language to include 'all people' was designed to include non-citizens and persons not born in the United States within the coverage of the Act. The amendment was not so broad as to extend coverage to all rights of all people. The 'all persons' language of the statute speaks only to the issue of to which persons the Act applies. It does not purport to delineate the rights accorded those individuals. The standard against which the rights of the protected individuals must be matched remains the rights of white citizens."
>
> * * * *
>
> "Where new forms of discrimination becomes apparent and the existing laws are not appropriate to deal with them, the legislature and not the courts has the responsibility and the power to fashion new laws to combat the discrimination."

Of course, the coverage of aliens was provided by amendment later in 1870 after passage of the Fourteenth Amend-

ment eliminated doubts that Congress had power to go beyond citizens in granting protection. *Guerra v. Manchester Terminal,* 350 F. Supp. 529 (S.D. Tex. 1972) affd. on this point 498 F.2d 641 (C.A. 5, 1974).

Decisions of this Court so far have not moved in the direction which Petitioners suggest, as is evident from holdings under §1982 which also derives from Section 1 of the Civil Rights Act of 1866 and also contains the same language "as is enjoyed by white citizens."

In *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 235, 237 (1969), a white property owner was held to have standing under 42 U.S.C. §1982 to sue for the redress of damages inflicted upon him because of his effort to uphold the right of a Negro to rent and enjoy the white person's property in an all-white neighborhood. The same holding was made earlier in a restrictive covenant case under the Fourteenth Amendment in *Barrow v. Jackson,* 346 U.S. 249, 259 (1953). In both cases this Court upheld the standing of white litigants to vindicate the rights of others—"non-Caucasians" in *Barrow v. Jackson,* supra, 348 U.S. at 259-60, and "minorities protected by §1982" in *Sullivan v. Little Hunting Park,* supra, 396 U.S. at 237.

In *Sullivan* the white property owner sustained direct injury to himself because of interference with his right to rent his own property to a negro, yet the Court found it necessary to determine the white person's standing to enforce the right of "minorities protected by §1982" to become renters of property in order to grant him relief.

Sullivan was applied by the Second Circuit in a §1981 case *DeMatteis v. Eastman Kodak Co.,* 511 F.2d 306 (C.A. 2, 1975). There a white plaintiff was held to have

a §1981 cause of action against his employer who forced him into premature retirement because he sold his house in a white neighborhood to a black fellow-employee. The court, citing *Sullivan,* held "a white person . . . who has been 'punished for trying to vindicate rights of [non-white] minorities . . . .' has standing to sue under §1981."

CONCLUSION

Respondent Union prays that the judgment be affirmed.

Respectfully submitted,

CHRIS DIXIE
JAMES P. WOLF
609 Fannin Street Bldg.
Suite 401
Houston, Texas 77002
Attorneys for Respondent

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No. 75-260

In the Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD AND RAYMOND L. LAIRD,
PETITIONERS

v.

SANTA FE TRAIL TRANSPORTATION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General,
WALTER W. BARNETT,
CYNTHIA L. ATTWOOD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether a complaint by white employees that their employer discriminated against them on the basis of race in firing them for theft of company property while retaining a similarly situated black employee states a claim under Title VII of the Civil Rights Act of 1964.

2. Whether a white person has standing under 42 U.S.C. 1981 to sue for alleged racial discrimination in employment.

INTEREST OF THE UNITED STATES

Pursuant to Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, the Attorney General, as well as the Equal Employment Opportunity Commission, has responsibility for enforcement of federal laws providing for equal employment opportunity. This case, although brought by private plaintiffs, presents questions concerning Title VII's prohibition of discrimination on account of race, color, religion, sex, or national origin in cases where offenses constituting crimes against the company are involved. Similar issues arise in cases brought by the government, and the outcome here will accordingly affect the government's enforcement responsibilities under the Act.

Resolution of the Section 1981 issue presented in this case will also have an impact on the government's responsibilities under Title VII. In the context of a suit by an aggrieved black employee, Section 1981 has been held to provide a private remedy independent of those authorized under Title VII for redress of employment discrimination claims. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Whether whites have standing to sue under Section 1981, or must rely exclusively on the procedures and remedies under Title VII, will thus affect the government's enforcement responsibilities.

STATEMENT

On October 2, 1970, petitioner McDonald was a truck driver employed by respondent Sante Fe Trail

Transportation Company in Houston, Texas. Petitioner Laird was a dock foreman at the company's Houston terminal (Pet. App. G, p. 53). On that date both were fired, having been charged by the company six days earlier with theft of ten cases of antifreeze from a customer's shipment (Pet. 3; Pet. App. F, pp. 49–50). A black employee, also charged with the theft, was retained (Pet. App. G, p. 55).[1]

Petitioner McDonald immediately filed a grievance with respondent Local Union No. 988, denying the theft and complaining of wrongful discharge (Pet. App. F, p. 49–50).[2] The grievance was denied and on April 7, 1971, petitioners filed a charge with the Equal Employment Opportunity Commission alleging that the company had engaged in unlawful discrimination in employment.[3] The Commission issued a right-to-sue

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[1] There is no indication that any of the three employees have been charged criminally, and petitioners state (Br. 21, n. 42) that criminal charges have not been filed against them.

[2] The Grievance Report was dated October 8, 1970 (Pet. App. F, p. 49), but petitioners alleged and the company agreed that the grievance was commenced "[o]n or about October 2," the date of discharge (Pet. App. G, p. 55; Pet. App. B, p. 26).

[3] In the district court, Santa Fe alleged that the grievance proceeding had terminated on October 29, 1970 (Pet. App. B, p. 26), and that therefore the then-applicable 90-day period for filing a charge with the EEOC had run prior to petitioners' filing on April 7, 1971. (See 42 U.S.C. 2000e–5(d) (1970), since amended to allow for 180 days, 86 Stat. 104, 42 U.S.C. (Supp. IV) 2000e–5(e).) Petitioners alleged that notice of the termination of the grievance procedures was not received until April 3, 1971 (Pet. App. G, p. 55). The district court did not rule on the timeliness of petitioners' filing since "the nature of the notice given upon termination of grievance proceedings" would be dispositive and "that is

letter on July 15, 1971, and on August 16, 1971, petitioners commenced this action against Sante Fe and the Union in the United States District Court for the Southern District of Texas. Petitioners charged that, in violation of Title VII and Section 1981, Sante Fe had discriminated against them on the basis of race in discharging them while retaining the black employee who was also charged with theft, and that the Union had "acquiesced and/or joined in" the unlawful discrimination (Pet. App. G, pp. 55–57). Petitioners sought a declaratory judgment, preliminary and permament injunctions, reinstatement, and back pay (*id.* at 57–58).

The district court dismissed the complaint, ruling that white persons lack standing to sue under Section 1981, and that the facts alleged by petitioners failed to state a claim under Title VII (Pet. App. B, pp. 24–28).[4]

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a matter which would require an evidentiary hearing" (Pet. App. B, pp. 26–27). From this it appears that the district court assumed that the filing of the grievance with the Union would toll the 90-day period, which runs from the date when "the alleged unlawful employment practice occurred" (42 U.S.C. 2000e–5(d) (1970), as amended, 42 U.S.C. (Supp. IV) 2000e–5(e)). Neither the validity of this assumption (which is supported by controlling precedent in the Fifth Circuit, *Culpepper* v. *Reynolds Metals Company*, 421 F. 2d 888, *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303) nor the timeliness of petitioners' filing with the EEOC is presented to this Court; both are matters that, if petitioners prevail here, should be determined on remand.

[4] The court also ruled that it had no Title VII jurisdiction over the Union because it had not been named by petitioners in their EEOC charge. Petitioners have not contested this determination and thus the Union's liability, if any, can be based only on Section 1981.

The court of appeals affirmed *per curiam* (Pet. App. A, pp. 21–23). It held that "an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII," and that Section 1981 "confers no actionable rights upon white persons" (Pet. App. A, p. 22).

ARGUMENT

INTRODUCTION AND SUMMARY

1. Much of the impetus behind the Civil Rights Act of 1964 came from Congress' desire to rid this Nation of discrimination against blacks. The Act in its entirety, however, and Title VII in particular, go far beyond assuring equal civil rights to blacks alone: Title VII, for example, prohibits employment discrimination against "any individual" because of such individual's "race, color, religion, sex, or national origin." 42 U.S.C. 2000e–2(a). It follows that the claim of employment discrimination raised in this case is not barred under Title VII simply because those asserting it happen to be white.

Nor have petitioners lost the protections of Title VII by allegedly engaging in conduct amounting to a crime against their employer. It is true that employers are not forbidden by Title VII from firing individuals for theft, but such employee conduct does not relieve employers of their obligation to refrain from discriminating on the basis of race. Under Title

VII, an employer may not fire an individual for race-related reasons, even if other, racially neutral justifications for the discharge exist. *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792.

McDonnell holds that, although an employer may meet an employee's *prima facie* showing of unlawful discrimination by articulating a legitimate, nondiscriminatory reason for the employment action taken, the employee must be given a fair opportunity to demonstrate that the employer's asserted justification is merely a pretext for a racially motivated employment decision. This means, in the context of this case, that petitioners' complaint should not have been dismissed without their first having been "given a full and fair opportunity to demonstrate by competent evidence that whatever the stated reasons for [their discharge], the decision was in reality racially premised" (411 U.S. at 805, n. 18).

2. Section 1981, perhaps even more than the Civil Rights Act of 1964, resulted from congressional concern for the rights of black persons. Its origins lie in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, and it grants to all persons the same several rights therein enumerated "as [are] enjoyed by white citizens." Yet neither this phrase nor the statute's source denies whites standing to enforce its terms. The legislative history of the 1866 Act shows that it was intended to secure the rights of whites as well as blacks, and that the reference to "white citizens" was meant, not to restrict the benefits of the legislation to blacks, but "to emphasize the racial character of the rights being

protected." *Georgia* v. *Rachel*, 384 U.S. 780, 791. In any event, if there is to be force behind the statute's command that "all persons" shall have the same right to contract for their employment services "as is enjoyed by white citizens," then white citizens themselves must be able to exercise such rights free of racial discrimination, for as their rights are abridged so are "all persons['']." There is no reason to believe that Congress meant to insist upon racially neutral treatment of non-whites alone; the denial of employment opportunity, based upon what ought to be the irrelevant consideration of race, is no less unfair when aimed at whites.[5] In either case racial prejudice causes an immediate injustice, contributes to overall racial discord, and defeats the congressional goal of assuring all persons equal rights under the law regardless of race.

Although whites faced with racial discrimination in employment may invoke the protections afforded by Title VII, the availability of redress under Section 1981 remains important. Section 1981 reaches employers not subject to Title VII, and authorizes remedies not available under that statute. "Congress has made available * * * independent administrative and judicial remedies. The choice is a valuable one." *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461. Congress meant it to be available to whites as well as non-whites.

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[5] This case does not present, and we do not address, questions presented in the context of actions undertaken, in judicial proceedings or otherwise, to remedy the effects of past discrimination.

I

TITLE VII ENCOMPASSES A CLAIM THAT WHITE EMPLOYEES WERE FIRED FOR MISAPPROPRIATING COMPANY PROPERTY WHILE A SIMILARLY SITUATED BLACK EMPLOYEE WAS NOT

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e–2 (a)(1)). The protection against unlawful discrimination thus afforded is sweeping: racial and other impermissible considerations under the statute are to play no part in employment decisions. Otherwise Title VII does not interfere with an employer's conduct of his business. The decision whom to employ, what wage to pay, what promotion and retirement policy to follow, and whom to fire—all of these an employer is free to make under Title VII for any reason or no reason at all, so long as race and the other listed characteristics remain neutral factors.

Petitioners, both white, are former employees of respondent Sante Fe. They and a black employee of Sante Fe were charged by the company with theft of company property. They were fired: the black was not. In their complaint petitioners alleged (Pet. App. G, p. 55) that Sante Fe "imposed a more severe disciplinary sanction against them because of their race, Caucasian[,] than against their [N]egro counterpart." This states a cause of action under Title VII and the courts below erred in denying petitioners an opportunity to prove their allegations.

The judgment below apparently was not based on a holding that whites lack standing under Title VII to complain of racial discrimination in employment. Such a ruling, in any event, would be unsupportable. Title VII applies broadly to prohibit discrimination in employment against "any individual," not only on account of race, but also because of such individual's "color, religion, sex, or national origin." 42 U.S.C. 2000e–2(a)(1). Nothing in the language of the statute or its legislative history indicates that Congress intended these protections to apply selectively. On the contrary, as this Court observed in *Griggs* v. *Duke Power Company*, 401 U.S. 424, 431:

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.

Instead the courts below appear to have believed that an employee loses the protection of Title VII if he engages in conduct amounting to a crime against his employer. Thus, the court of appeals ruled (Pet. App. A, pp. 22–23), in language very similar to the district court's (Pet. App. B, p. 28), that "an em-

ployer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII * * *. There is no allegation that plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not involved in this case. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 * * *."

McDonnell Douglas does indeed control this case, but it requires a different result than that reached below. In that case plaintiff Green, a black employee, was discharged for what he considered to be racial reasons, and in protest he interfered with access to his employer's plant. He was charged with and pleaded guilty to obstruction of traffic. When the employer began to recall other laid off employees it refused to rehire Green, citing his illegal conduct. Green's Title VII suit alleged that the employer's asserted reason was mere pretext for another racially motivated employment decision.

This Court took the occasion to clarify the rules concerning the order and allocation of proof in private, nonclass-action Title VII cases. It ruled that the complainant must first make out a *prima facie* case, and it gave an example of how such a showing might be made (411 U.S. at 802; footnote omitted):

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

In giving this example, the Court was not setting out an immutable catalogue of the elements necessary to a *prima facie* case in every Title VII action. The Court expressly noted (411 U.S. at 802, n. 13) that different factual situations will call for different showings. If the complainant in *McDonnell Douglas* had been white, for example, and thus unable to satisfy the first of the four elements above, then presumably he would have to supplement the other three, assuming they could be established, with some other fact tending to show that he had been the victim of racial discrimination. A showing, for example, that the employer had hired only blacks over a long period, notwithstanding applications from qualified whites, might be sufficient in such a case.

Where a black complainant alleges that he has been discharged for racial reasons, then under *McDonnell Douglas* he presumably could make out a *prima facie* case by showing (1) that he belonged to a minority, (2) that he was qualified for and satisfactorily performing his job, (3) that he was fired nonetheless, and (4) that the employer sought to or did replace him with someone else of similar qualifications. A white complainant in a similar case, unable to show

membership in a minority, would have to supply an appropriate substitute for the first element in order to establish a presumption of racial discrimination. This he might do, we suggest, by showing that the supposed reason for which he was fired applied equally to a black employee, who was not fired.

This, of course, is essentially what petitioners have alleged they can prove, and nothing in the pleadings demonstrates their inability to do so. If they succeed "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for [petitioners'] rejection" (411 U.S. at 802).[6] Dismissal of petitioners' complaint for failure to state a claim under Title VII was therefore erroneous. *Conley* v. *Gibson*, 355 U.S. 41.

The Court in *McDonnell Douglas* noted that the employer had met Green's *prima facie* showing of discrimination by assigning his criminal conduct as the reason for refusing to rehire him. "Nothing in Title VII," said the Court, "compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it" (411 U.S. at 803; footnote omitted). Presumably the judgment below rests on this ruling, but the Court's analysis did not stop so abruptly (*id* at 804):

> [T]he inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

In short, nothing in Title VII prevents Santa Fe from following a pattern of firing all employees who steal from the company. Indeed, that statute does not prevent Santa Fe from firing some but not all such employees. It forbids Santa Fe absolutely, however, from treating employees differently on the basis of race, and this prohibition applies with equal force to all employment decisions, even those made in the wake of criminal conduct by the employee against the company. Accordingly, the judgment below should be reversed so that petitioners may have "a full and fair opportunity to demonstrate by competent evi-

[6] If, as petitioners claim, the black employee was similarly situated to petitioners in regard to the alleged theft, then Santa Fe will not be able to claim that alleged theft is an absolute disqualification to continued employment. It may be, however, that the black employee was not similarly situated to petitioners in other respects, and that he was treated differently for legitimate, nondiscriminatory reasons, but dismissal of petitioners' complaint precluded inquiry into these matters.

dence that whatever the stated reason for [their discharge]" (411 U.S. 805, n. 18), Santa Fe "imposed a more severe disciplinary sanction against them because of their race" (Pet. App. G, p. 55).

II

WHITE PERSONS HAVE STANDING UNDER 42 U.S.C. 1981 TO COMPLAIN OF RACIAL DISCRIMINATION IN EMPLOYMENT

Section 1981 guarantees that "[a]ll persons" shall enjoy equally the several rights therein enumerated, including the right to contract for one's employment services. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454. Previous rulings of this Court establish that both aliens and blacks have standing to enforce the provisions of Section 1981, and indicate that whites have standing thereunder to vindicate the civil rights of blacks. The anomalous result reached by the court below, that Congress meant to grant standing in those circumstances yet deny the sweeping protection of Section 1981 to white persons as a class, is refuted by the statute on its face and its legislative history. With its origins in the Civil Rights Act of 1866, 14 Stat. 27, the underlying purpose of which was to assure equal civil rights to all persons in the United States, Section 1981 was meant equally to protect whites and non-whites. The description of the rights therein protected as those "enjoyed by white citizens" was intended to stress their racial character and their scope,

not to exclude white victims of racial discrimination from the statute's ambit.

Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face this provision applies without exception to "[a]ll persons." The suggestion implicit in the judgment below, that the phrase "as is enjoyed by white citizens" was meant to deny whites the protections of the statute, is without support in logic or legislative history. Prior to the remedial Civil War legislation, of which Section 1981 is a part, "white citizens" possessed rights denied to blacks, who were ineligible for citizenship because of their race. In conveying rights to the same extent as those enjoyed by "white citizens," Congress in Section 1981 bestowed those rights upon "[a]ll persons" to the full extent enjoyed by the theretofore most favored segment of the population. Congress could not have meant that the specified rights of white citizens could be diminished in comparison with those of another racial group. For such diminution of the rights of white citizens would lead to a corresponding shrinkage

in the rights of "[a]ll persons," a result Congress surely did not intend.

Section 1981 is derived from Section 1 of the Civil Rights Act of 1866, 14 Stat. 27 (*Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 422, n. 28), which provided:

> That all persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

The broad purposes of the 1866 Act were to assure "the fundamental principle of citizenship by birth within the dominion" (*United States* v. *Wong Kim Ark*, 169 U.S. 649, 675) and to "affirmatively secure for all men, whatever their race or color, * * * the 'great fundamental rights'" therein enumerated (*Jones, supra*, 392 U.S. at 432). When the 1866 Act was reenacted following passage of the Fourteenth Amendment, the rights to hold and convey property were codified in what is now 42 U.S.C. 1982, and are

conferred upon "[a]ll citizens of the United States."[7]

The remaining rights, however, which now appear in Section 1981, are given equally to "[a]ll persons." Thus the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866" (*Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237) has been extended under Section 1981 to aliens as well as to citizens. *Graham* v. *Richardson*, 403 U.S. 365, 377; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 419–420; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675, 688; *Inada* v. *Sullivan*, 523 F. 2d 485 (C.A. 7); *Guerra* v. *Manchester Terminal Corporation*, 498 F. 2d 641, 653–654 (C.A. 5); *Roberto* v. *Hartford Fire Insurance Company*, 177 F. 2d 811 (C.A. 7); *Hollander* v. *Sears, Roebuck and Company*, 392 F. Supp. 90, 94, n. 5 (D. Conn.); see also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369. The standing thus conferred extends to aliens of all races, including Caucasians (see *Roberto, supra*).

In *Wong Kim Ark, supra*, this Court extensively reviewed the Civil Rights Act of 1866 and its relationship to the Fourteenth Amendment. In that case the issue was whether an individual born of Chinese nationals domiciled in the United States is an American citizen if his birth occurs in this country. The

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[7] The 1866 Act, passed pursuant to the authority granted Congress by the Thirteenth Amendment, was reenacted upon passage of the Fourteenth Amendment by Section 18 of the Enforcement Act of 1870, 16 Stat. 140. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Court ruled that both the Civil Rights Act of 1866 and the Fourteenth Amendment, whose origins and purposes were in many respects identical,[5] were intended unmistakably to affirm the common law's positive answer to that question. 169 U.S. at 675–676. Although the main purpose of the Amendment was "to establish the citizenship of free [N]egroes * * * and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens," the Court said that "the opening words 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in *The Slaughterhouse Cases* * * *" (169 U.S. at 676). Thus notwithstanding that the Fourteenth Amendment had as its principal design the amelioration of discrimination against blacks, it gave to them " 'no right superior to that granted to the white race' " and " '[t]he same rule must be applied to both races' " (*id.* at 692).

Section 1981 (then Section 1977 of the Revised Statutes) was to the same effect. By Section 1 of the Civil Rights Act of 1866, the Court noted, " 'all persons born in the United States, and not subject to any foreign power * * * are declared to be citizens of the United States. This provision comprehends the

[5] See also *Hurd* v. *Hodge*, 334 U.S. 24, 32: "[T]hat statute and the Amendment were closely related both in inception and in the objectives which Congress sought to achieve. * * * It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy."

Chinese * * *, the people called Gypsies, as well as the entire race designated as blacks * * *. Every individual of these races, born in the United States, is, by the bill, made a citizen of the United States' " (169 U.S. at 682). This view of the statute was based on unequivocal legislative history: during the Senate debates it appeared clearly that the Act would confer citizenship on Germans, Chinese, Gypsies—indeed, "all persons, without any reference to race or color," born in this country of alien parents domiciled here. *Id.* at 697–698.

The Court also explained that no constriction of the 1866 Act was to be inferred from its changed appearance when re-enacted in 1870. In its earlier form the statute's guarantees extended to citizens "of every race and color"; in the re-enactment these words were deleted in favor of persons "within the jurisdiction of the United States," the words now found in Section 1981. The substitution, however, "was not considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form * * *" (*id.* at 695–696).

If so much of Section 1 of the 1866 Act as defined citizenship applies equally to all races, despite its principal intendment to protect blacks, there can, we submit, be no justification for limiting the other guarantees of that statute to exclude whites. In the context of a suit by a black plaintiff, this Court recently ruled "that § 1981 affords a federal remedy

against discrimination in private employment on the basis of race" which supplements and under some circumstances "may be highly preferred over" the distinct avenue of relief afforded by Title VII of the Civil Rights Act of 1964. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459–460, 461.[9] Moreover, this Court has held that in appropriate circumstances standing exists in white persons to sue under Section 1982 to vindicate the rights of blacks (*Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237); given "the historical interrelationship between § 1981 and § 1982" (*Tillman* v. *Wheaton-Haven Recreation Ass'n*, 410 U.S. 431, 440), that is tantamount to a ruling that standing under Section 1981 exists in similar circumstances.[10] Thus, the court of appeals' ruling, if affirmed, would ascribe to Congress the intent to allow whites to sue under Section 1981 to redress racial discrimination against non-whites and discrimination based on alienage against themselves, but not racial discrimination against themselves—notwithstanding that non-whites suffer no such disability.

The legislative history of the 1866 Act, however, demonstrates that, in granting to all persons the same rights therein enumerated "as [are] enjoyed by white

[9] See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 and n. 7 (Congress intended Title VII and Section 1981 as "parallel or overlapping remedies against discrimination").

[10] The Second Circuit so held in *DeMatteis* v. *Eastman Kodak Co.*, 511 F. 2d 306, 312, n. 9, and suggested as well that the holding in *Sullivan* was intended to refer to both Sections 1981 and 1982, since that action was brought under both statutes (see 396 U.S. at 235). See also *Valle* v. *Stengel*, 176 F. 2d 697 (C.A. 3).

citizens," Congress did not intend to limit the class of persons for whose benefit the legislation was enacted. The phrase did not appear in the bill as it first passed the Senate. At that time Senator Lyman Trumbull, the floor manager, explained that the bill applied equally to blacks and whites (Cong. Globe, 39th Cong., 1st Sess. 599 (1866)):

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness: * * * Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce * * * a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?

The reference to "white citizens" was subsequently added, without debate, on motion by the House manager of the bill, Congressman James F. Wilson (Cong. Globe, 39th Cong., 1st Sess. 1115 (1866)). Wilson himself appeared to believe that the protections of

the bill were not limited to blacks,[11] but he was apparently concerned lest they be thought to extend to women and children as well.[12] When the bill was resubmitted to the Senate for approval of the House amendments, Senators Trumbull and Van Winkle discussed the meaning of the Wilson amendment and demonstrated their understanding that it had not altered the bill's reach as they had previously perceived it (Cong. Globe, 39th Cong., 1st Sess. 1413 (1866)):

> Mr. VAN WINKLE. There seems to be an incongruity in this language to which I wish

[11] "Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[12] The only explanation Congressman Wilson gave for the amendment came in response to an inquiry from Congressman Delano whether it would confer upon blacks the right to be jurors. Wilson said it would not: "The words to which the gentleman has directed attention were not in the original bill, but were placed there by an amendment offered by myself. And the reason for offering it was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension; and I think the very reason which was urged by those who desired the amendment to be incorporated in the bill, is an answer to the objection the gentleman makes." Cong. Globe, 39th Cong., 1st Sess. (House App. p. 157) (1866)

> to call the attention of the chairman of the committee. The clause commences with the words "and such citizens." As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts," &c., "as is enjoyed by white citizens." It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> Mr. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the [conference] committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.

In short, the phrase, "as is enjoyed by white citizens," was not intended to limit standing under Sec-

tion 1981 to non-whites. Instead, those words were apparently intended to point up the limits on the kind of rights protected by the statute. As this Court noted in *Georgia* v. *Rachel*, 384 U.S. 780, 791:

> The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected.[13]

Here petitioners, alleging "that they were discharged [because] of their race, Caucasian" (Pet. App. G, p. 54), seek to protect interests clearly "within the zone of interests to be protected" by the statute. *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153. As we have shown, Congress intended Section 1981 to protect "[a]ll persons" from racial discrimination in employment, and accordingly the court of appeals erred in denying petitioners standing on the basis of their race.

[13] The courts have, accordingly, dismissed complaints under Section 1981, by both white and black plaintiffs, when racial discrimination has not been alleged. *E.g., Agnew* v. *City of Compton*, 239 F. 2d 226 (C.A. 9), certiorari denied, 353 U.S. 959; *State of Louisiana ex rel. Purkey* v. *Ciolino*, 393 F. Supp. 102 (E.D. La.); *Clifton* v. *Grisham*, 381 F. Supp. 324 (N.D. Miss.); *Kurylas* v. *Department of Agriculture*, 373 F. Supp. 1072 (D.C.C.), affirmed *per curiam*, 514 F. 2d 894 (C.A.D.C.); *Van Hoomissen* v. *Xerox Corporation*, 368, F. Supp. 829, 838–839 (N.D. Calif.).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.
WALTER W. BARNETT,
CYNTHIA L. ATTWOOD,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

L. N. McDONALD AND RAYMOND L. LAIRD,
Petitioners,

v.

SANTA FE TRANSPORTATION COMPANY AND TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION No. 988,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
ROBERT C. MAYER
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

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IN THE

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v.

SANTA FE TRANSPORTATION COMPANY AND
TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY
EMPLOYEES, LOCAL UNION No. 988,
Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") hereby moves for leave to file the attached brief as *amicus curiae* in support of the position of the petitioners in the above captioned case.

The AFL-CIO is a federation of 110 national and international unions having a total membership of 14 million working men and women of all races, creeds and colors. From its inception, AFL-CIO has championed the elimination of all vestiges of racial discrimination from American life. It has endeavored to further this goal through the rule of law, and because of its commitment has sought no exemptions for unions from the sweep of federal statutes addressed to that end. Thus, as AFL-CIO President George Meany stated, when testifying in support of the passage of

Title VII of the Civil Rights Act of 1964:

> "The leadership of the AFL-CIO, and of the separate federations before merger, has been working ceaselessly to eliminate those prejudices. The leaders of every affiliated national and international union are enlisted in the same effort. We have come a long way in the last 20 years—a long way farther, I might say, than any comparable organization, including the religious organizations as a whole, and certainly we are a generation or more ahead of the employers as a whole.
>
> "But we have said repeatedly that to finish the job we need the help of the U.S. Government. * * * When the rank-and-file membership of a local union obstinately exercises its right to be wrong, there is very little we in the leadership can do about it, unaided. * * *
>
> "In short, I am not here to ask for special exemptions for unions; quite the contrary. I hope the law you draft will cover the whole range we ourselves have written into our constitution * * *."*

See also the Brief in which the AFL-CIO joined this Term in *Franks* v. *Bowman Transportation Co.*, No. 74-728, argued November 3, 1975.

The decision below is troubling to the AFL-CIO and its affiliates in two respects: (1) it declares that a federal law—42 U.S.C. § 1981—extends protections against racial discrimination to members of one race but not members of another; and (2) it holds that the victims of racial discrimination in employment may not invoke the protections

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* EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2158-59.

of another federal law, Title VII, if they have engaged in conduct amounting to a crime under State law.

The Federation believes that the two conclusions reached below are wrong as a matter of statutory interpretation; but more, that they are unfortunate impediments to the national interest in eradicating racial discrimination. The first is inconsistent with the basic precept of "equal justice under law" which in our variegated society must be the touchstone of all legislation designed to cure discrimination. The second cuts into the protection against actions motivated by racial discrimination which Congress intended to furnish in enacting Title VII.

With respect to the first of the issues presented herein—whether 42 U.S.C. § 1981 protects whites against racial discrimination—the Federation believes that its extensive research into the legislative history of the statute may be of assistance to the Court. Although the petition refers to portions of that history, we have tendered in the attached brief a more complete recitation of the materials disclosing that Congress intended in § 1981 to afford protection against racial discrimination to whites as well as blacks.

With respect to the second issue presented—the availability of Title VII protections to employees who have committed acts of misconduct against their employer amounting to crimes under State law—the court below purported to find support for its holding in decisions under the National Labor Relations Act. In the attached brief, we have drawn upon our extensive experience under the NLRA to show that, quite the contrary to what the court below believed, the NLRA cases support petitioners' position.

WHEREFORE, AFL-CIO respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

J. Albert Woll
Robert C. Mayer
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-260

L. N. McDonald and Raymond L. Laird,
Petitioners,
v.
Santa Fe Transportation Company and
Teamsters Freight, Tank Line and Automobile Industry
Employees, Local Union No. 988,
Respondents.

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO") files this brief contingent upon the granting of the foregoing motion.

SUMMARY OF ARGUMENT

I

The legislative history makes unmistakably clear that Congress intended 42 U.S.C. § 1981, which forbids racial discrimination with respect to certain enumerated matters, to protect whites as well as blacks against such discrimination. That history is detailed at pp. 8-18 *infra*.

II

Title VII indisputably protects whites as well as blacks against racial discrimination. The court below, however,

held that employees of any race who engage in criminal conduct against their employer may not challenge the employer's discipline as violative of Title VII. That holding contravenes well-established principles.

An employer of course may discipline his employees *for misconduct*. But he cannot seize upon that misconduct as a pretext for imposing discipline for illegal reasons such as race. Disparate treatment is powerful evidence of illegal motivation, for the employer has shown by his more lenient treatment of others that his business interests do not dictate the harsher treatment. These principles, which this Court fully embraced in *McDonell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), have also been applied for decades under the National Labor Relations Act, which Congress used as a model in drafting Title VII. The principles are as applicable to misconduct which is "criminal" as to any other misconduct. State law may intervene to punish crimes, but the principles established by federal law do not bend out of shape simply because conduct is a State law crime. Petitioners have stated a claim of violation of Title VII.

ARGUMENT

I. THE SECTION 1981 CLAIM

Petitioners, two white employees, were fired for misappropriating their employer's property. A black employee who participated with them in the theft was not fired. The petitioners contend that the black employee was equally culpable, that the employer imposed heavier discipline on them because of their race, and accordingly that their rights under 42 U.S.C. § 1981 were violated.

For petitioner's allegations to state a claim under § 1981, two legal propositions must be resolved in their favor:

(1) That such protections against racial discrimination as § 1981 affords extend to whites as well as blacks; and

(2) That § 1981's guarantee of equal rights to "make and enforce contracts" is transgressed by an employer's imposition of disparate discipline, because of race, upon equally culpable employees.

The court below ruled against petitioners on the first proposition, and never addressed the second. As we show in Part A, the court was wrong on the issue it decided: § 1981 protects whites equally with blacks. Then, in Part B, we suggest that this Court not decide the second proposition now, but rather leave it for initial consideration below.

A. Such Protections Against Racial Discrimination As 42 U.S.C. § 1981 Affords Extend To Whites As Well As Blacks

42 U.S.C. § 1981, a portion of Section 1 of the Civil Rights Act of 1866,[1] provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The court below held that this statute forbids discrimination against blacks because of their race, but not discrimination against whites because of *their* race. That was

[1] The other portion is codified as 42 U.S.C. § 1982.

its reading of the words "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." But a statutory direction that blacks shall have "the same right" as whites can just as reasonably be understood to preclude according preferential rights to blacks. Moreover, § 1981 does not stop with the above-quoted language, but adds that "all persons . . . shall be subject to like punishment, pains, penalties, . . . and exactions of every kind." Thus, in its entirety, the language of the statute suggests that Congress intended to forbid racial discrimination against whites as well as against blacks. And the legislative history confirms that this is so.[2]

The bill which eventuated in the Civil Rights Act of 1866 was reported out by the Senate Judiciary Committee on January 12, 1866, a few days after the Thirteenth Amendment had been adopted. The bill's title when introduced—and the title which it retained upon enactment—was "An act to protect all persons in the United States in

[2] The petitioners have cast the question before this Court as one of standing: "Whether white employees . . . have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. § 1981." Petition, p. 2. We believe the question is rather one of the substantive meaning of the statute. If § 1981 prohibits racial discrimination against whites, petitioners of course have standing to assert that their rights under the statue have been violated. If, on the other hand, § 1981 forbids only racial discrimination against blacks, petitioners have failed to state a claim of violation. This is not a case in which whites seek to predicate a claim upon alleged racial discrimination against blacks—the context in which standing becomes the critical question. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209, n. 8 (1972).

their civil rights and furnish the means of their vindication."[3]

As introduced, Section 1 of the bill declared that "the inhabitants of every race or color . . . shall have the same right to make and enforce contracts, . . . and shall be subject to like punishment, pains, and penalties, and to none other . . ."[4] It did not contain the additional phrase "as is enjoyed by white citizens."

Senator Trumbull, the Chairman of the Judiciary Committee, was the principal spokesman for the bill. When Senator Davis, an opponent of the bill, suggested that the bill was unfair to whites, Senator Trumbull issued an impassioned refutation.

> "He [Senator Davis] denounces this bill as 'outrageous,' 'most monstrous,' 'abominable,' 'oppressive,'

[3] 71 Cong. Globe (39th Congress, 1st Session) 211 (remarks of Senator Trumbull); 72 Cong. Globe 1861 (remarks of the Speaker).

[4] The full text of Section 1, as introduced, was:

> "There shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." 71 Cong. Globe 474; see also *id.* at 211.

'iniquitous,' 'unconstitutional,' and 'void.'

"Now, what is this bill that is obnoxious to such terrible epithets? *It is a bill providing that all people shall have equal rights.* Is not that abominable? Is not that iniquitous? Is not that most monstrous? Is not that terrible on white men? [Laughter.] When was such legislation as this ever thought of for white men?

"*Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights*, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these *a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?*"[5]

On February 2, 1866, the Senate passed the bill without

[5] 71 Cong. Globe 599 (remarks of Senator Trumbull) (emphasis added). Opponents, too, understood that the bill protected whites. *Id.* at 500, 603 (remarks of Senator Cowan); *Id.* at 505 (remarks of Senator Johnson). Even Senator Davis, whose contrary understanding had provoked Senator Trumbull's refutation, later indicated his recognition that pursuant to the bill "all the people of every State, black and white, shall have the same civil rights *eo nomine*." 72 Cong. Globe 1415 (remarks of Senator Davis).

material change.[6] The bill then went to the House,[7] and on March 1, 1866, the debate on the bill commenced on the floor of the House. Representative Wilson, the Chairman of the House Judiciary Committee and the floor manager of the bill, explained that his Committee proposed that the bill be amended by changing the word "inhabitants" to "citizens":

> "This amendment is intended to confine the operation of this bill to citizens of the United States, instead of extending it to the inhabitants of the several States, as there seems to be some doubt concerning the power of Congress to extend this protection to such inhabitants as are not citizens."[8]

Representative Wilson then offered "the following amendment, not as coming from the committee, but because it is necessary to perfect the amendment already offered":

> "Insert after the word 'property' in line fifteen of the first section, the words 'as is enjoyed by white citizens'; so that the clause will read: shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, as is enjoyed by white citizens."[9]

Representative Wilson's description of the bill's purpose, which followed immediately after he proposed this change, makes clear that he did not intend by adding these words

[6] 71 Cong. Globe 606-607.

[7] 71 Cong. Globe 646.

[8] 72 Cong. Globe (39th Congress, 1st Session) 1115 (remarks of Rep. Wilson).

[9] *Ibid.*

to remove the bill's prohibition of racial discrimination against whites:

> "It provides for the equality of citizens of the United States in the enjoyment of 'civil rights and immunities' . . .
>
> ". . . [C]ivil rights are the natural rights of man: and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.
>
> ". . . *Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another. One class shall not be required to support alone the burdens which should rest on all classes alike. That is the spirit and scope of the bill, and it goes not one step beyond.*" [10]

He added that if all citizens were of one race there would be no need for the bill:

> "But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." [11]

Representative Shellabarger, a supporter, answered charges that the bill invaded States' rights. He explained that Section 1:

> "neither confers nor defines nor regulates any right whatever. Its whole effect is not to confer or regulate rights, but to require that whatever of the enumerated rights and obligations are imposed by State laws shall

[10] 72 Cong. Globe 1117 (remarks of Rep. Wilson) (emphasis added).

[11] 72 Cong. Globe 1118 (remarks of Rep. Wilson).

> be for and upon all citizens alike without distinctions based on race or former condition in slavery.
>
> ". . . Its whole effect is to require that whatever rights as to each of these civil . . . matters the States may confer upon one race or color of the citizens *shall be held by all races in equality*. Your State may deprive women of the right to sue or contract or testify, and children from doing the same. *But if you do so, or do not do so as to one race, you shall treat the other likewise.*" [12]

The bill was passed by the House,[13] and was returned to the Senate. Because of the amendments which the House had made,[14] the bill was referred to the Senate Judiciary Committee for consideration.[15] On the following day, the Senate Committee unanimously recommended concurrence in the House amendments.[16]

[12] 72 Cong. Globe 1293 (remarks of Rep. Shellabarger) (emphasis added). Other supporters expressed like views. *Id.* at 1124 (remarks of Rep. Cook); at 1159 (remarks of Rep. Windom). None expressed a contrary view.

[13] 72 Cong. Globe 1367.

[14] In addition to the amendments discussed heretofore, the House amended the bill in one other important respect. As explained in *Georgia* v. *Rachel*, 384 U.S. 780, 791-792 (1966), the Senate bill had contained "a general provision forbidding 'discrimination in civil rights or immunities,' preceding the specific enumeration of rights to be included in § 1. Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against 'discrimination in civil rights or immunities.' There was sharp controversy in the Senate, but the bill passed. After similar controversy in the House, however, an amendment was accepted striking the phrase from the bill."

[15] 72 Cong. Globe 1365.

[16] 72 Cong. Globe 1376.

The House's addition of the words "as is enjoyed by white citizens" sparked the following exchange on the Senate floor:

> "MR. VAN WINKLE: There seems to be an incongruity in this language. . . . The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> "MR. TRUMBULL: I quite agree with the Senator from West Virginia that these words are superfluous. I do not think they alter the bill. I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worthwhile to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and as in the opinion of the committee which examined this matter they did not alter the meaning of the bill, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it.
>
> "MR. VAN WINKLE: It is a mere verbal correction that I suggested, and I am not at all strenuous about it. . . ."[17]

[17] 72 Cong. Globe 1413.

The Senate approved the bill with the House amendments,[18] and the bill was referred to the President.

President Johnson vetoed the bill. He stated that "a perfect equality of the white and black races is attempted to be fixed by Federal law"; that as to the matters enumerated in the bill no State could "ever exercise any power of discrimination between the different races"; that Congress was seeking to "abrogate all State laws of discrimination between the two races in the matter of real estate, of suits, and of contracts generally"; and that Congress was seeking to "repeal all State laws discriminating between whites and blacks in the subjects covered by this bill."[19]

When the Senate took up reconsideration of the bill following the veto, Senator Trumbull confirmed the accuracy of the President's reading:

> "The bill neither confers nor abridges the rights of anyone, but simply declares that in civil rights there shall be an equality among all classes of citizens and that all alike shall be subject to the same punishment . . . Each state . . . may grant or withhold such civil rights as it pleases; all that is required is that, in this respect, its laws shall be impartial."[20]

The Senate voted to override the veto, and the bill was referred to the House.[21] In the House the principal speech urging that the veto be overridden was delivered by Representative Lawrence, and it included the following observations:

[18] 72 Cong. Globe 1422.

[19] 72 Cong. Globe 1679-80 (veto message of President Johnson).

[20] 72 Cong. Globe 1760 (remarks of Senator Trumbull).

[21] 72 Cong. Globe 1809.

"[The bill] does not confer any civil right, but so far as there is any power in the States to limit, enlarge, or declare civil rights, all these are left to the States.

"But it does provide that as to certain enumerated civil rights every citizen 'shall have the same right in every State and Territory.' That is *whatever of certain civil rights may be enjoyed by any shall be shared by all citizens in each State, and in the Territories*, and these are:

"1. To make and enforce contracts.

"2. To sue, to be sued, and to be parties.

"3. To give evidence.

"4. To inherit, purchase, lease, sell, hold and convey real and personal property.

"5. To be entitled to full and equal benefit of all laws and proceedings for the security of person and property." . . .

. . . .

> "*This bill, in that broad and comprehensive philanthropy which regards all men in their civil rights as equal before the law, is not made for any class or creed, or race or color, but in the great future that awaits us will, if it become a law, protect every citizen. . . .*"[22]

In an eloquent closing, Representative Lawrence declared:

> "Mr. Speaker, this Nation must settle the question whether among her own citizens there may be a discrimination in the enjoyment of civil rights . . . If States may deny to any class of our citizens the right to make contracts, to own a homestead; may strip men of all that is valuable in life; if we shall sanctify this

[22] 72 Cong. Globe 1832, 1833 (remarks of Rep. Lawrence) (emphasis added).

> as the mission of the American Government, *some friendless class or race may suffer today, but as sure as retributive justice exists the terrible wrong will sooner or later 'return to plague the inventors,' and we who have 'sown the wind' may 'reap the whirlwind.'*
>
> "But if we shall [vindicate the Constitution by enacting this bill] then may we hope that the men of today and of all times will enjoy its benefits and blessings forever."[23]

On April 9, 1866, the House joined the Senate in overriding the veto, and the bill became law.[24]

Soon thereafter, in part because some Congressmen were concerned that the Thirteenth Amendment might be held to have been insufficient authority for enactment of the Civil Rights Act of 1866, Congress proposed the Fourteenth Amendment.[25] In 1870, following the ratification of the latter Amendment, Congress re-enacted the provisions of Section 1 of the 1866 Act,[26] changing the words "such citizens of every race or color" to "all persons within the jurisdiction of the United States" in order to extend the Act's protections to aliens.[27] Subsequent codifications of

[23] 72 Cong. Globe 1837 (remarks of Rep. Lawrence) (emphasis added).

[24] 72 Cong. Globe 1861.

[25] *Hurd* v. *Hodge*, 334 U.S. 24, 32-33 (1948).

[26] Sections 16 and 18 of the Act of May 31, 1870, c. 144, §§ 16, 18, 16 Stat. 140, 144.

[27] The legislative history of this extension is described in *Guerra* v. *Manchester Terminal Corp.*, 350 F. Supp. 529, 533-536 (S.D. Tex. 1972), affirmed on this issue, 498 F.2d 641, 653-654 (5th Cir. 1974). See also *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410, 419-420 (1948).

the 1866 Act have split Section 1 into two parts, now appearing as 42 U.S.C. §§ 1981, 1982.[28]

The foregoing legislative history shows beyond question that Congress intended Section 1 of the 1866 Act to apply to racial discrimination against whites, as well as against blacks, and the court below erred in declaring otherwise.[29]

[28] See, previously, Revised Statutes of 1874, §§ 1977, 1978.

[29] The question of Congress' constitutional authority to protect whites against private employment discrimination has been little discussed in the cases. Congress did not purport to be acting under the commerce clause when it enacted § 1981, and this Court did not, in *Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), suggest that the 1866 Act's application to private discrimination was confined to instances of involvement of interstate commerce. Assuming that § 1981 reaches private employment discrimination (see pp. 19-20, n.30, *infra*), two other constitutional predicates are available for its protection of whites:

(1) The Congress which enacted the 1866 Act thought that the enabling clause of the Thirteenth Amendment authorized it to protect persons of all races against racial discrimination regarding fundamental rights: any such racial discrimination was a "badge or incident of slavery." See, e.g., 71 Cong. Globe 474 (remarks of Senator Trumbull); 72 Cong. Globe 118 (remarks of Representative Wilson); *Id.* at 1124 (remarks of Senator Cook); *Id.* at 1159 (remarks of Representative Windom). See also *Walker* v. *Pointer*, 304 F. Supp. 56, 58 (N.D. Tex. 1969).

(2) In any event, as the Thirteenth Amendment at least authorized Congress to protect *blacks* against private racial discrimination, *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 437-444, Congress' authority to assure that an enactment to that effect did not result in preferential treatment of blacks may be seen as "a power ancillary to the enabling clause of the Thirteenth Amendment." *WRM.A Broadcasting Co.* v. *Hawthorne*, 365 F. Supp. 577, 581 (M.D. Ala. 1973) (Johnson, J.). Cf. *Houston, E.&W.T.R. Co.* v. *United States*, 234 U.S. 342 (1914).

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B. This Court Should Not Reach or Decide the Question Whether the Particular Act of Racial Discrimination Alleged Here Would, if Proved, Constitute a Violation of § 1981

We have shown that whatever protections against racial discrimination are afforded to blacks by 42 U.S.C. § 1981 are afforded to whites as well. A holding to that effect is sufficient to dispose of the lone § 1981 issue addressed by the courts below, and would warrant a remand of this case for further proceedings consistent with that holding. We respectfully urge that this Court not take the further step of deciding whether the particular act of racial discrimination alleged here—the imposition of disparate discipline, because of race, upon equally culpable employees—would, if proved, constitute a violation of § 1981.[30]

Indeed, had Congress not extended § 1981's protection to whites it might have run afoul of the Fifth Amendment, by forbidding discrimination against one race while countenancing it against the other. The instant case highlights the constitutional issue. The petitioners here alleged that white and black employees had "equal complicity" in a jointly-perpetrated theft, and that the employer meted out disparate discipline solely because of their race. Could Congress, consistently with the Fifth Amendment, forbid the employer's visiting the heavier discipline upon the black because of his race, while leaving the employer free to visit the heavier discipline upon the whites because of *their* race?

[30] This Court has declared that § 1981's provision relating to "racial discrimination in the making and enforcement of contracts" affords "a federal remedy against discrimination in private employment on the basis of race." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459-460 (1975). No party in *Johnson* questioned the applicability of § 1981 to private employment discrimination (cf. *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974)), and no party in the instant case has asked the Court to reconsider the correctness of *Johnson*. Accordingly, our discussion in the text

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This Court observed in *Jones* v. *Mayer Co.*, *supra*, 392 U.S. at 413, that § 1982 is "not a comprehensive open housing law," and in that respect has a more limited substantive scope than the recently-enacted civil rights laws regulating housing discrimination. In like manner, § 1981 is not a comprehensive fair employment law. Unlike Title VII of the Civil Rights Act of 1964, which devotes hundreds of words to defining what is and is not discriminatory employment conduct, § 1981 merely prohibits racial discrimination with respect to the "right . . . to make and enforce contracts." Moreover, as noted above (p. 13, n. 14), the Congress which enacted the 1866 Act rejected a comprehensive anti-discrimination clause in favor of one confined to specifically enumerated subjects, thus suggesting caution in defining § 1981's sweep.

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assumes *Johnson's* continued viability. In other pending cases, however, this Court has been asked to reconsider the correctness of its seminal holding in *Jones* v. *Mayer Co.*—from which *Johnson* flowed—that Section 1 of the Civil Rights Act of 1866 applies to private discrimination. *Runyon* v. *McCrary*, No. 75-62, cert. gr. 44 L.W. 3279 (1975) (Petition, pp. 6-9); see also *Fairfax-Brewster School, Inc.* v. *Gonzales*, No. 75-66, cert. gr. 44 L.W. 3279 (1975) (Petition, pp. 7-9). The correctness of *Jones* v. *Mayer Co.* has been much debated. See, e.g., *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 241 (1969) (dissenting opinion of Mr. Justice Harlan, joined by the Chief Justice and Mr. Justice White); *McCrary* v. *Runyon*, 515 F.2d 1082, 1086-87 (4th Cir. 1975) (*en banc*). As the issue is before the Court pursuant to the grant of certiorari in *Runyon* v. *McCrary*, and so that no implication may be drawn from our silence, we are constrained to observe that a reading of the legislative history of the 1866 Act in its entirety, which we undertook in preparation of this brief and of the brief we joined in *Franks* v. *Bowman Tpn. Co.*, No. 74-728, has left us with an indelible impression that the Congress of 1866 *thought* its bill applied only to State action.

The content to be imparted to the words "make and enforce contracts" has been little explored by the lower courts, and has not been addressed by any court in the context of the particular behavior alleged here: disparate discipline. It is one thing to hold that an employer who discriminatorily refuses to hire the members of a particular race has violated § 1981: by his conduct he has engaged in racial discrimination in the making of employment contracts. It is quite another to say that every discriminatory action taken by an employer against his employees constitutes invasion of the "equal right" to "make and enforce contracts". Compare the widely divergent interpretations of that phrase in the majority and dissenting opinions in *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975) (*en banc*), cert. gr. 44 L.W. 3279 (1975).[31]

The substantive scope of § 1981 has not been considered by either of the lower courts in the instant case, was not discussed by the parties in the petition and briefs in opposition, and quite likely will not be addressed in the briefs on the merits. In these circumstances, we respectfully suggest that the matter be left for initial exploration by the courts below.[32]

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[31] See also the cross-petition for certiorari in *United Order of American Bricklayers* v. *Waters*, No. 74-1350, pp. 2, 17.

[32] There is an additional consideration which may arise in some § 1981 employment cases, albeit not in this one. In enacting Title VII of the 1964 Act, Congress determined that there were some practices which, although arguably discriminatory, should not be invalidated by Title VII. Section 703 (e)-(j), 42 U.S.C. § 2000e-2 (e)-(j). There may conceivably develop instances where conduct specifically protected in Title VII is said to violate § 1981. The question of the interrelationship of the two laws would then be posed. As Congress focused specifically on private employment

(*Footnote continued on next page.*)

II. THE TITLE VII CLAIM

Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a), provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) To fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race. . . ."

No party herein disputes that this provision forbids racial discrimination against whites as well as against blacks. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The legislative history of Title VII clearly evidences Congress' intention to forbid racial discrimination against whites.[33]

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discrimination in shaping the 1964 Act, but did not do so at all when considering the 1866 Act, there are substantial arguments for harmonizing the substantive reach of the two statutes in such instances. Comment, *Racial Discrimination in Employment under the Civil Rights Act of 1866*, 36 U. Chi. L. Rev. 615, 632-633 (1969). See also *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1320, n. 4 (7th Cir. 1974), pets. for cert. pending, Nos. 74-1064, 74-1350. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 249-253 (1970). This Court has recognized that a similar question exists with respect to the interrelationship between § 1982 and Title II of the 1964 Act. *Tillman* v. *Wheaton-Haven Recreation Association*, 410 U.S. 431, 438-439 (1973).

[33] The floor managers of Title VII in the Senate, Senators Clark and Case, introduced a series of materials designed to constitute a definitive interpretation of Title VII. One of these materials was a

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In the instant case, petitioners allege that for reasons of race their employer has imposed more severe discipline upon them than upon an equally-culpable black co-employee for a jointly perpetrated theft against the employer. The court below ruled that petitioners did not state a claim of violation of Title VII: having admitted the commission of a criminal act against their employer, the court below rea-

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series of "objections" and "answers". Among the "objections" was the following:

> "Objection: Many employers will lean over backwards to avoid discrimination, and as a result will discriminate against other employees. . . .
>
> "Answer: . . . [T]he Commission has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the Act, including the obligation not to discriminate against whites." EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (hereinafter "Leg. Hist.") 3014-15.

Yet another of the "objections" was as follows:

> "Objection: The bill would require employers to establish quotas for non-whites in proportion to the percentage of non-whites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory" (Leg. Hist. 3015).

Another of the legislative materials introduced was an interpretative memorandum prepared by Senators Clark and Case. Insofar as relevant here, the memorandum stated:

> "There is no requirement in Title VII that an employer maintain a balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race". (Leg. Hist. 3040).

The memorandum also stated that employers would "not be obliged —*or indeed, permitted*—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are

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soned, Title VII afforded them no protection against the consequences. This holding is wrong.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973), this Court recognized the self-evident proposition that an employee's race or color cannot insulate him from the ordinary consequences of misconduct:

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hired, to give them special seniority rights at the expense of the white workers hired earlier" *ibid.* (emphasis added).

Yet another of the materials introduced by Senators Clark and Case was a Department of Justice memorandum responding to certain objections which had been raised by Senator Hill. Explaining that Title VII does not require racial quotas, this memorandum added:

> "On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the Civil Rights Bill seeks to accomplish is equal treatment for all." (Leg. Hist. 3245)

Senator Williams, one of the leading supporters of the bill, explained during the debates that "to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by Title VII of this bill." (Leg. Hist. 3189). Indeed, precisely because discrimination against whites was encompassed by Title VII, Congress became intrigued with the question whether the Harlem Globetrotters could retain their identity as an all-black team. (Leg. Hist. 3013-14, 3191.) The conclusion was that they could, because they did not employ enough people to be covered by Title VII (Leg. Hist. 3013-14). In like manner, questions were raised as to the motion picture industry's ability to depict black characters without discriminating in employment (Leg. Hist. 3013-14). The conclusion was that they could insist upon employees who resembled the characters they wished to be portrayed, but could not limit hiring by race (i.e., they could hire persons who "looked" black, but could not insist that they *be* black) (*ibid*).

> "Nothing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it."

The court below cited *McDonnell Douglas* as supporting its conclusion, apparently deeming the foregoing statement dispositive. Manifestly, that court did not read far enough, for in *McDonnell Douglas*, Mr. Justice Powell went on to declare:

> "[B]ut the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." *Id.* at 804. In other words, an employer is free to fire employees for engaging in unlawful conduct, and if that is indeed its reason it has not violated Title VII. But the existence of valid grounds for discharge will not legitimatize a discharge actually predicated upon race.

Of particular relevance here, in *McDonnell Douglas* this Court recognized that disparate treatment is powerful evidence that an employment decision has been impermissibly tainted by racial motivation:

> "Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired. Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races." *Id.* at 804.

The court below purported to find support for its contrary holding in decisions under the National Labor Relations Act. Reference to the NLRA is, of course, appropriate, for it too is an anti-discrimination statute, and Congress used it as a model in drafting Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-420 and n. 11 (1975). Indeed, in *McDonnell Douglas*, 411 U.S. at 803-804, this Court found "pertinent" the holding in *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240, 255 (1939), that wrongdoers are not insulated from discharge *for their wrongs*. But the court below erred in failing to perceive that under the NLRA, as under Title VII, that is not the end of the inquiry.

Section 8(a)(3) of the NLRA forbids discrimination on the basis of union allegiance or non-allegiance. As *Fansteel* recognized, this provision does not insulate a union adherent from discipline for acts of misconduct. But conversely, an employee's misconduct will not legitimatize discipline which in fact was imposed because of the employee's union allegiance. And the strongest evidence of improper motivation is that other employees, who are not union adherents, were treated less harshly for the same offense. In that circumstance, the employer cannot contend that the discipline of the union adherent was necessary to achieve legitimate business interests—the more lenient treatment of others belies the claim. As this Court explained in *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 312 (1965), "where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen too long to the plea that shop discipline was simply being enforced."

Nor have the NLRA cases declined to apply these principles where the particular employee misconduct consisted of criminal activity against the employer. Of course an employer may discipline employees for such misconduct, and the employees may be prosecuted by the State as well. But the NLRA is not an instrument of the criminal laws, and its principles do not bend out of shape because conduct amounts to a crime under State law.[34] Thus, if an employer seizes upon an employee's criminal conduct as a pretext to inflict an injury in fact motivated by the employee's union allegiance, Section 8(a)(3) is violated.

The reference in the opinion below to *Nix* v. *NLRB*, 418 F.2d 1001 (5th Cir. 1969), appears to suggest that the Fifth Circuit has, in a case arising under the NLRA, taken a view of the scope of § 8(a)(3) contrary to that just stated. In *Nix*, as here, the employee had engaged in theft against the employer, and the Fifth Circuit there declared that the theft "furnished ample grounds for discharge." *Id.* at 1006. But the court recognized in *Nix* that there remained an issue as to "whether or not the reason assigned for discharge was pretextual, i.e., that the real motive for Nix's discharge was his activities with the [union]." *Ibid.* The court sustained the discharge only because it found that the discharge was indeed for theft, and not pretextual. *Id.* at 1006-08.

The Fifth Circuit captured the essence of the NLRA law in *NLRB* v. *Finesilver Mfg. Co.*, 400 F.2d 644 (5th Cir. 1968). There three employees were involved in a fight. The two pro-union employees were fired; the one non-union employee was not. The court recognized, of course, that em-

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[34] See, e.g., *Steelworkers* v. *Labor Board*, 376 U.S. 492, 501-502 (1964); *Labor Board* v. *Rice Milling Co.*, 341 U.S. 665, 672 (1951).

ployers may fire employees for fighting. But on the facts of the case, the court reasoned:

> "[T]he fight cannot withstand scrutiny as a reason for discharging [the two pro-union employees] because Gonzalez, who was friendly to management, was not fired. Since Gonzalez was not fired, it can reasonably be inferred that Palacios and Fabian would not have been treated differently but for their known allegiance to the union." *Id.* at 647.

In sum, an employer who has treated criminal conduct less severely when engaged in by non-union employees cannot be heard to say that he does not want "criminals" working for him: he has shown, by his retention of non-union "criminals," that his plea is false.

For like reasons, an employer violates Title VII if, *because of race*, he visits more severe discipline upon employees of one race who engage in criminal misconduct than upon those of another race who are equally culpable. That principle does no violence to the employer's legitimate interests, but rather reflects his own evaluation of those interests. Since the employer has not deemed the misconduct sufficient to merit discharge when engaged in by employees of one race, he may not be heard to assert "business justification" as a shield for his racial discrimination.

Of course, in the instant case it remains for petitioners to prove their allegations. They have alleged, but have yet to prove, that in fact there was disparate treatment (i.e., that the black employee was indeed "equally culpable"), and that such disparate treatment was visited because of race, and not for other reasons.[35] But petitioners' allega-

[35] For example, an employer might show that although all em-

(Footnote continued on next page.)

tions state a claim of violation of Title VII, and the court below erred in holding otherwise.

CONCLUSION

For the reasons set forth hereinabove, the decision below should be reversed.

Respectfully submitted,

J. Albert Woll
Robert C. Mayer
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for AFL-CIO

ployees were equally culpable, their prior work records were greatly different and thus warranted mitigation in the case of one employee but not in the case of others.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-260

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Petitioners,

vs.

SANTA FE TRANSPORTATION COMPANY AND TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH & KRONENBERG
2011 Eye Street, N. W.
Suite 800
Washington, D. C. 20006
Attorneys for the Amicus Curiae

LAWRENCE B. KRAUS
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel
Chamber of Commerce of the United States of America
1615 H Street, N. W.
Washington, D. C. 20006

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* on behalf of the Petitioner in this case. The Petitioner has consented to the filing by letter to this Court.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000)

business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court; *e.g.*, *Franks* v. *Bowman Transportation, Inc., et al.*, No. 74-728 (decision pending); *Geduldig* v. *Aiello, et al.*, 417 U. S. 484 (1974); *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, 43 L. W. 4657 (1975); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al*, 416 U. S. 115 (1974).

The issue of this case, whether Caucasians have actionable rights under 42 U. S. C. Section 1981, the Civil Act of 1866, and under Title VII to protest racial discrimination is of major interest to the Chamber's membership. The Chamber's members are interested in employing those whose qualifications render them most fit for the work. The decision below impacts upon this interest. Thus, the effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense this decision denies Caucasians equal employment opportunities. That is, by construing the Civil Rights Acts to deny Caucasians protection against racial discrimination in employment, the court has invited agency administrators or private "affirmative action" groups to pressure employers in order to obtain preferences in employment for non-Caucasians. Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences compel reverse discrimination and are attended, apart from constitutional and ethical problems, by increased production costs and reduced efficiency.

Thus, since this Court's decision will exert a substantial impact upon the Chamber's members, the Chamber requests this Court to grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH
& KRONENBERG
2011 Eye Street, N. W.
Suite 800
Washington, D. C. 20006
Attorneys for the Amicus Curiae

LAWRENCE B. KRAUS
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel
Chamber of Commerce of the
United States of America
1615 H Street, N. W.
Washington, D. C. 20006

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

SUMMARY OF ARGUMENT*

This case brings into clear focus the question of whether all races are protected against racial discrimination in employment through the invocation of the Civil Rights Acts, or whether these Acts protect only non-Caucasians. The *amicus* contends that the Congressional commentaries relating to these Acts demonstrate that all races may invoke their protection, including Caucasians. Furthermore, the *amicus* contends that only this construction of these Acts comports with the Constitution and responds to the exigencies of society.

---

* The interest of the *amicus* is set forth in the accompanying Motion.

Thus, the *amicus* contends that Caucasians, as well as non-Caucasians, have actionable rights under 42 U. S. C. § 1981 to challenge racial discrimination in the employment area. The precursor of 42 U. S. C. § 1981 was Section 1 of the Civil Rights Act of 1866. This Act was designed to enforce the provisions of the Thirteenth Amendment. The commentaries of the Congressional architects of Amendment Thirteen and the Civil Rights Act of 1866 evince a determination to extend the perimeters of these enactments to encompass the civil rights of all races and to shield these rights from those intrusive forces that would abridge them.

As with the Thirteenth Amendment and Section 1981, so Congress had fashioned Title VII to protect all races—including the Caucasian—from racial discrimination. The Congressional explanations concerning the coverage of that Title, together with the introduction to Executive Order 11375 demonstrate unequivocally that Title VII is underpinned by the concept of meritocracy whereby fitness for the job, rather than immutable personal characteristics, determines who will be employed.

Furthermore, in order to comport with the Constitution, Section 1981 and Title VII must be read to confer actionable rights on Caucasians and non-Caucasians alike. It is submitted that under the Constitution, neither Caucasians nor non-Caucasians are entitled to any advantage in employment nor are subject to any disability because of race. The decision below has ignored this precept and instead has interpreted these Acts to classify persons according to their race and to deny only to Caucasians—because of their race—the right to protest discrimination in employment. Accordingly, the statutory construction of the decision below cannot stand.

Moreover, the effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense, this decision denies Caucasians equal employment opportunities. That is, by construing the Civil Rights Acts to deny Caucasians protection against

racial discrimination in employment, the court permits governmental agencies or private "affirmative action" groups to pressure employers in order to obtain preferences in employment for blacks or other non-Caucasians. Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences compel reverse discrimination. It is submitted that any racial classification is constitutionally impermissible, that no Constitutional right exists for any race to be preferred, and that no governmental purpose—even that of eradicating past general minority discrimination—can justify the imposition of racially oriented hiring preferences that deny employment to qualified persons, Caucasians and others alike, on the basis of race. Yet the decision below attributes to the Civil Rights Acts just such a prohibited purpose and effect.

For all these reasons, the decision below must be reversed. In so doing, this Court should reaffirm its pronouncements of *Griggs* that the right to work depends upon fitness for the work and on an equal right of all, regardless of race to compete in an open market, and does not depend upon membership in a particular racial group; this Court should stress that the Civil Rights Acts command the elimination of racial barriers, not their creation, in order to satisfy a notion as to how society ought to be organized. In view of the decision below, such a restatement is necessary.

ARGUMENT

This case brings into clear focus the question whether all races are protected against racial discrimination in employment through the invocation of the Civil Rights Act, or whether these Acts protect only non-Caucasians. The *amicus* contends that the Congressional commentaries relating to these Acts demonstrate that all races may invoke their protection, including Caucasians. Furthermore, the *amicus* contends that only this construction of these Acts comports with the Constitution and responds to the exigencies of society.

A. Caucasians Have an Actionable Right Under 42 U. S. C. Section 1981 to Challenge Racial Discrimination Directed Against Them.

The question here is whether Caucasians have an actionable right under 42 U. S. C. § 1981 to challenge their discharge for misappropriation of company property when a black employee, who was also charged with misappropriating this property, was not discharged.[1] It is established that Section 1981 proscribes private racial discrimination in employment against blacks by employers and unions. *Johnson* v. *Railway Express Agency, Inc., et al.*, 421 U. S. 454 (1975); *Waters* v. *Wisconsin Steelworkers of International Harvester*, 472 F. 2d 476 (CA 7, 1974). The determination of whether Caucasians enjoy similar protection requires an examination of the Congressional commentaries surrounding the origin of that statutory section.

This necessary historical odyssey begins with the adoption of the Thirteenth Amendment:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation."

This Amendment was designed to establish that the "rights of mankind, without regard to color or race, are respected and protected[,]" and was intended to "make the future safe for the rights of each and every citizen."[2]

1. 42 U. S. C. § 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

2. Cong. Globe, 38th Cong., 1st Sess. 2989-2990, 1202 (1864).

This Court has recognized specifically that the perimeter of the Thirteenth Amendment extends to encompass the rights of all races:

> "It reaches every race and every individual and if in any respect it commits one race to the nation it commits every race and individual thereof. Slavery or involuntary servitude of the Chinese, or the Italian, or of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African." *Hodges* v. *United States*, 203 U. S. 1 (1906).

The enforcing legislation of the Thirteenth Amendment was Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, the precursor of Section 1981. *Johnson* v. *Railway Express Agency, supra.* That bill, the Civil Rights Act of 1866, was "intended to give effect to the Thirteenth Amendment by guaranteeing 'to all persons within the United States practical freedom.' "[3] In explicitly refuting a colleague's assertion that the Civil Rights Bill protected only blacks and not Caucasians, Senator Trumbull positively stated:

> "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his palce and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very

3. Cong. Globe, 39th Cong., 1st Sess, 366 (1866), remarks of Senator Trumbull, a principal architect of both this Bill and the Thirteenth Amendment. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1 at page 18 (1975).

> object of the bill is to break down all discrimination between black men and white men?" Cong. Globe, 39th Cong., 1st Sess., 599 (1866).

With full awareness that the Civil Rights Bill secured the rights of Caucasians as well as of blacks, the Senate passed it in February, 1866.

The House then amended the bill to include—without debate—the phrase "as enjoyed by white citizens." (Cong. Globe 39th Cong. 1st Sess. 1115 (1866)) These words, appearing as they do in Section 1981, have caused some courts, including the court below, to conclude that the 1866 Act as amended and Section 1981 offer nothing to a plaintiff who is himself a Caucasian.[4] This Conclusion is unwarranted as the pertinent legislative history demonstrates. Thus, the phrase, "as enjoyed by white citizens," was introduced in the House by Representative Wilson, who then reaffirmed that the bill preserved the fundamental rights of all persons, regardless of color:

> "Mr. Speaker, if all our citizens were of one race and one color, we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the State, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and *we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.*" (Emphasis added) Cong. Globe, 39th Cong., 1st Sess., 1115, 1118 (1866).[5]

4. Comment: *Section 1981 and Private Groups, The Right to Discriminate* v. *Freedom from Discrimination,* 84 Yale L. J. 1441 at 1448, note 40 (1975).

5. The natural rights philosophy underpinning the Civil Rights Bill was convincingly articulated by Representative Lawrence who joined this philosophical concept with that of equal protection of the laws:

> ". . . Legislative powers exist in our system to protect, not destroy, the inalienable rights of man . . . there are two ways in which a State may undertake to deprive citizens of these absolute, inherent and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them." Cong. Globe, 39th Cong., 1st Sess., 1832-1833 (1866).

Thus, the bill's sponsors in the House, just as those in the Senate, articulated that this bill secured the inalienable liberties of all.

When the bill passed the House and was returned to the Senate for concurrence, attention focused upon the added phrase. In the following colloquy between Senators Trumbull and VanWinkle it became apparent that these added words in no way altered congressional intent to protect the rights of all citizens:

> "MR. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> "MR. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. *I do not think they alter the bill.* I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and *as in the opinion of the committee which examined this matter they did not alter the meaning of the bill,* the committee thought proper to

recommend a concurrence, and I hope the Senate will concur in it." (Emphasis added.)[6]

The Senate then passed the Civil Rights Bill as amended.

This journey through the history encompassing the Civil Rights Act of 1866 unequivocally establishes Congressional acceptation of the principle that the Act was conceived to foster the civil rights of all, including Caucasians, and to shield these rights from those intrusive forces that would abridge them.[7]

Furthermore, 42 U. S. C. § 1982 just as § 1981 is derived from the Civil Rights Act of 1866 and like § 1981 is intended to enforce the Thirteenth Amendment. *Jones* v. *Alfred H. Mayer Co., supra.* Thus, not coincidentially, the language in these two statutory sections is similar, concerning racial discrimination. Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same rights . . . to make and enforce contracts . . . as is enjoyed by white citizens."

Section 1982 provides:

> "All citizens of the United States shall have the same rights . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property."

This Court in *Jones* v. *Alfred H. Mayer Co., supra,* previously has determined that Section 1982 interdicts all discrimination because of race. In the words of this Court:

> "Section 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, . . ." (emphasis in the original) 392 U. S. at 413.

6. Cong. Globe, 39th Cong., 1st Sess. 1413 (1866).

7. The Civil Rights Act of 1866 was reenacted by Section 18 of the Enforcement Act of 1870, 16 Stat. 140, 144, and later codified in Section 1977 of the Revised Statutes of 1874 before becoming 42 U. S. C. § 1981. The reenactment in 1870, following ratification of the Fourteenth Amendment, was intended to eliminate any constitutional question concerning the Act's applicability to the several states. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 436.

It follows, due to their common derivation and design, that just as Section 1982 proscribes all racial discrimination in the sale of property, so Section 1981 bans *all* racial discrimination in employment.[8]

B. Caucasians Have Actionable Rights Under Title VII of the Civil Rights Act of 1964 to Challenge Racial Discrimination Directed Against Them.

Title VII as originally enacted, reflected the mainstream of social thought on remedying discriminatory practices. This Court has recognized that the purpose of that enactment was "to assure equality of employment opportunities by eliminating those practices and devises that discriminate on the basis of race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974). However, Title VII was not intended to disadvantage Caucasians by preferring other groups on the employment scene. Thus, Senator Kuchel, commenting on the proposed bill in 1964, observed that a court "cannot order *preferential hiring* or promotional consideration for any particular race, religion, or other group." (110 Cong.

8. Several lower courts have reached this conclusion. In *Carter* v. *Gallagher,* 452 F. 2d 315, 325 (CA 8, 1971), *cert. den.* 406 U. S. 950 (1972), the court recognized that ". . . Section 1981 and the Fourteenth Amendment proscribes any discrimination in employment based on race, whether the discrimination be against whites or blacks." That court reaffirmed this position in *Brady* v. *Bristol-Meyers, Inc.,* 459 F. 2d 621 (1972). Other courts to reach this conclusion include *Hollander* v. *Sears, Roebuck and Co.,* .... F. Supp. .... (D. Conn. 1975), 10 FEP Cases 473 (Caucasian may maintain an action under Section 1981 against an employer who refused to consider him for employment, allegedly for racially discriminatory reasons); *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F. Supp. 577 (M. D. Ala. 1973) (Caucasian employee may sue under Section 1981 to enjoin blacks from forcing his discharge because of his race); *Central Presbyterian Church* v. *Black Liberation Front,* 303 F. Supp. 894 (E. D. Mo. 1969) (Caucasians allowed to maintain Section 1981 action against black militants who disrupted church services); *Gannon* v. *Action,* 303 F. Supp. 1240 (E. D. Mo. 1969) affirmed on other grounds, 450 F. 2d 1227 (CA 8, 1971) (facts similar to *Central Presbyterian*).

Rec. 6563-64 (1964).) (emphasis added) Senators Clark and Case agreed with this observation:

> "[An employer] would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." (110 Cong. Rec. 7217 (1964))

An identical view is acknowledged by Senator Humphrey:

> ". . . There is nothing in [Title VII] that will give any power to the commission or to any court to require hiring, firing, or promotion of employees, in order to meet a racial 'quota' or to achieve a certain racial balance." (110 Cong. Rec. 6549 (1964))

The original determination that Title VII unequivocally prohibits all racial discrimination—whether against non-Caucasians or Caucasians—was reaffirmed by congressional commentaries surrounding the 1972 amendments to that Title. Thus, Senator Javits (who sponsored many bills which culminated in the 1972 amendments) explicitly stated that Title VII was an "antidiscrimination" measure. (118 Cong. Rec. S. 161 (daily ed., January 20, 1972)). Senator Javits thereby acknowledged that color-blindness was the keystone of Title VII and that the Act mandated that race, religion, sex and national origin be irrelevant to securing or retaining employment. Javits' remarks, just as those reflected in the 1964 commentaries, demonstrate that Title VII is underpinned by the concept of meritocracy whereby immutable personal characteristics such as race are not relevant to an individual's employment qualifications.

Congressional determination to attack *all* invidious class prejudice in employment by Title VII is also articulated in the preamble to Executive Order 11375 (amending Executive Order 11246, relating to equal employment opportunity):

> "The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.
>
> Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in government employment, employment by federal contractors and subcontractors and employment under federally assisted construction contracts regardless of race, creed, color or national origin."

Thus, as with the Thirteenth Amendment and Section 1981 of the Civil Rights Act, Congress has viewed the protection of Title VII as encompassing all races, including Caucasians.

Congressional intendment that the civil liberties of all be secured by Title VII has been recognized by this Court. In *Griggs* v. *Duker Power Co.*, 401 U. S. 424, 430-431, 436 (1971), this Court stated:

> "[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. Congress has made [job] qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant."

This principle of meritocracy was emphasized in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 801 (1973), where this Court reaffirmed that the national goal is "fair and racially neutral employment . . . decisions." Finally, dispelling any doubt of the scope of Title VII, this Court in *Johnson* v. *Railway Express Agency*, *supra*, stated that that enactment "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights. *Anyone* aggrieved by employment discrimination may lodge a charge with the EEOC." 421 U. S. at pages 457, 458 (emphasis added).

Guided by this Court and the scheme of Title VII, the EEOC has consistently recognized that the Act proscribes racial discrimination against Caucasians, and that Caucasians have substantive rights under the Title to challenge this discrimination. Thus, in finding that an employer transgressed Title VII's prohibitions by refusing to hire a Caucasian because of her race, the Commission stated:

> ". . . Title VII . . . proscribes preferential treatment . . . 'opening the doors long shut to minorities is imperative, but in so doing we must be careful not to close them in the face of others, lest we abandon the basic principle of nondiscrimination that sparked the effort to pry open these doors in the first place.' " (EEOC Decision No. 75-268, (1974), 10 FEP Cases 1502, 1503.[9]

This decision reaffirmed an earlier opinion where the Commission stated:

> ". . . the Commission's congressional mandate [is] to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians. As the Supreme Court stated in *Griggs* v. *Duke Power,* 401 U.S. 424 (1971), 'discriminatory preference for any group, minority or majority, is precisely what Congress has proscribed.' " EEOC Decision No. 74-31 (1973), CCH EEOC Decisions ¶ 6404.

The upshot is that this Court, the Congressional commentaries and the Commission have uniformly concluded that Caucasians may secure redress for racial discrimination against them by the invocation of Title VII which commands that no race should ever be accorded preferential treatment over another or granted privileges and prerogatives not given to other races.

9. To the same effect is EEOC decision No. 74-106, 1974 CCH EEOC Decisions ¶ 6427, where the Commission determined that failure to rehire an otherwise qualified caucasian teacher was impermissible race bias where an evaluation based mainly upon the teacher's race was used to disqualify her.

C. To Comport with the Constitution, Section 1981 and Title VII Must Be Read to Confer Actionable Rights on Caucasians and Non-Caucasians Alike.

The constitutional prohibitions of the Fifth and Fourteenth Amendments, just as those of the Thirteenth, are directed against all manifestations of racial discrimination.[10] The clear and preeminent purpose of these Amendments is to eliminate all sources of invidious racial discrimination.[11] Consonant with this unequivocal proscription against all forms of racial discrimination, the Constitution must be forever color-blind in the area of employment.[12] "There is no constitutional right for any race to be preferred. . . . There is no superior person by constitutional standards." *DeFunis* v. *Odegaard*, 416 U. S. 312, at 336-337 (1974), (dissenting opinion of Mr. Justice Douglas). Accordingly, it is submitted that neither Caucasians nor non-Caucasians are entitled to any advantage in employment or subject to any disability because of race.

This constitutional mandate eloquently demonstrates an awareness that society's prejudice and intolerance will be terminated only by the abolition of distinctions based upon race and other impermissible characteristics.[13] Conversely, racial

10. "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U. S. 497, 499; and subject to the 'most rigid scrutiny,' *Korematsu* v. *United States,* 323 U. S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. *Hirabayashi* v. *United States,* 320 U. S. 81, 100." *McLaughlin* v. *Florida,* 379 U. S. 184, 191, 192 (1964).

11. See *Loving* v. *Virginia,* 388 U. S. 1, 10 (1967); *Hodges* v. *United States, supra.*

12. *Hughes* v. *Superior Court,* 339 U. S. 460 (1950). See Kaplan, *Equal Justice* in *an Unequal World,* 61 Nw. U. L. Rev. 363, 382 (1966).

13. Senator Charles Sumner of Massachusetts, the chief architect of the equal protection clause, defined his concept of equal protec-

bigotry will be resurrected and perpetuated by legislative policy or judicial decisions whose effect is to classify persons according to race and inflict disabilities in the employment area upon a person solely because of his immutable and supposedly irrelevant racial characteristics.

The decision below has ignored these precepts and by its construction of the Civil Rights Acts of 1866 and 1964 has assumed that Congress would enact legislation that contravenes the Constitution. Thus, the decision below has interpreted these Acts to classify persons according to their race and to deny only to Caucasians—because of their race—actionable rights to protest employment discrimination. That is, the court below has held that Title VII and § 1981 confer no actionable rights on Caucasians if they seek to protest racial discrimination against them in the employment area. However, that court necessarily recognizes that these laws do confer substantive rights on similarly circumstances blacks. *Johnson* v. *Railway Express Agency*, *supra*. Thus, according to the statutory construction of the court below, a qualified black who is denied a job that is then awarded to a Caucasian, has an actionable right under the Civil Rights Acts to protest discrimination; on the other hand, a qualified Caucasian similarly denied a job that is then awarded to a black has no actionable right under these Acts to protest discrimination in an argument before the Supreme Court of Massachusetts in *Roberts* v. *Boston*, 59 Mass. (5 Cash.) 198 (1849) in an effort to overturn the state's segregated school law:

> "He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English or Irish; he is a Man, the equal of all his fellow-men." 2 Works of Charles Sumner, 341-342 (1974).

Though Sumner lost the case, the segregation law was immediately thereafter repealed, and Sumner's concept became the basis of the equal protection clause. Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 Wash. U. L. Q. 421 (1972).

tion. The decision below has thus construed the Civil Rights Acts so as to violate the Constitution by depriving only Caucasians of substantive rights to protest job discrimination and only because they are Caucasians. Accordingly, the statutory construction of the decision below should not be endorsed by the Court.

The effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense this decision denies Caucasians equal employment opportunities. By construing the Civil Rights Acts to deny Caucasians protection against racial discrimination in employment, the court has invited the application of coercive pressure against employers in order to obtain preferences in employment for blacks or other non-Caucasians.[14] Given the finite number of available jobs, such a practice would perforce reduce the number of job opportunities for which Caucasians could compete—solely on account of their race.[15] Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences also compel reverse discrimination. It is submitted that

14. Cf., *WMRA Broadcasting Co., et al.* v. *Hawthorne, et al.*, *supra*. In that case the defendants included black employees of WRMA and the president of the Alabama Action Committee, a group dedicated to secure employment for blacks and which had been long active in boycotting retail establishments to achieve its goal. These defendants sought to force plaintiff employer WRMA to discharge its station manager, who was also a plaintiff, only because he was a Caucasian. To obtain its objective, defendants engaged in mass picketing at the station's premises and in addition, threatened advertisers on the station in order to coerce them to discontinue advertising. While the court in *WMRA* found that plaintiffs had an actionable right under § 1981, a contrary holding—which would have been affirmed by the court below—would have permitted the defendants to continue their campaign with impunity and may well have resulted in the discharge of the Caucasian manager who, having been discharged solely on the basis of race, would have no redress. Cf., *Central Presbyterian Church* v. *Black Liberation Front, supra*.

15. *DeFunis* v. *Odegaard, supra*. It is not difficult to believe that the practice discussed in *DeFunis* could be imported from the academic to the commercial scene in an attempt to eradicate past general discrimination.

any racial classification is constitutionally impermissible, that "[t]here is no constitutional right for any race to be preferred," and that no governmental purpose—even that of eradicating past general minority discrimination—can justify the imposition of racially oriented hiring preferences that deny employment to qualified Caucasians.

However, unless Caucasians have an actionable right under the Civil Rights Acts to protest reverse discrimination—and the decision below denies this right—either this right to be free from such discrimination does not exist after all, or, if it exists, it has been rendered nugatory.[16] As stated, the *amicus* believes that the right to be protected from reverse discrimination does exist under the Constitution; accordingly, this right must be recognized by the Civil Rights Acts, the enforcing legislation of the applicable amendments.

For all these reasons, the decision below must be reversed. In so doing, this Court should reaffirm its pronouncements of *Griggs* that the right to work depends upon fitness for the work and on an equal right of all, regardless of race to compete on an open market, and does not depend upon membership in a particular racial group; this Court should strees that the Civil Rights Acts command "the elimination of racial barriers, not their creation in order to satisfy [a] theory as to how society ought to be organized."[17] In view of the decision below, such a restatement is necessary.[18]

While this Court has recently determined to consider certain problems related to reverse discrimination, *e.g., Franks* v. *Bowman Transportation, Inc., et al., supra,* the "slate is not entirely clean." *Defunis,* Mr. Justice Douglas, opinion at 337. In *Hughes* v. *Superior Court, supra,* this Court reviewed the contempt convictions of pickets who sought to compel an employer to prefer blacks to Caucasians in hiring clerks in order

16. See footnote 5.

17. *DeFunis,* opinion of Mr. Justice Douglas, at 342.

18. It is, of course, apparent that employers, conscious of productivity and efficiency, desire to hire the best qualified.

to ensure that fifty percent of his employees were black. This Court found that such picketing could be enjoined, since it was designed to "make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race." This Court recognized that if the pickets were upheld in their demand, "then other races, white, yellow, brown, and red, would have equal rights to demand discriminatory hiring on a racial basis, 339 U. S. at 463-464. This Court then noted:

> "[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, or Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Ibid.*

To permit employment opportunities to be parceled out, regardless of qualifications, according to some fixed notion on how society should be structured is to soon involve the courts in the business of resolving the competing claims of many separate groups, each clamoring for favored treatment and each asserting what it deems to be a plethora of past grievances to support its claims. A resurgence of the pre-*Brown*[19] era "us" and "them" concepts will likely follow.[20]

19. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). This decision emphasized that all racial discrimination is simply wrong and is thus proscribed.

20. Once minority preference quotas are approved in the employment field, preferences in the political arena may be sought. It may well be urged that the one-man one-vote principle should be no more durable than color-blindness in employment, and that the non-Caucasian needs two votes to "catch up". Thus, sanctioning quotas in one area has lasting and far reaching ramifications in others, and all such preferences undermine the constitutional precepts of our government.

In sum, this Court should not sustain the racial classification and barrier to Caucasians imported into the Civil Rights Acts by the decision below. Such an interpretation of those Acts is neither compelled nor justified and could well invite reverse racial discrimination in employment, attended by a resurgence of racial antagonism, with the goal of equal opportunity an unfortunate casualty. Rather, in determining the meaning of these Acts, this Court should be guided by the mandate of the Constitution, the intent of the architects of these Acts and by the needs of the present, "the exigencies of social life".[21] All point to one result: actionable rights under § 1981 and Title VII are to be accorded to all persons, Caucasian and non-Caucasian alike. This rule alone is the sensible rule for the governance of our nation, and the attainment of our goal of equal opportunity.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

GERARD C. SMETANA
JERRY KRONENBERG
JULIAN D. SCHREIBER
BOROVSKY, SMETANA, EHRLICH
& KRONENBERG
2011 Eye Street, N. W.
Suite 800
Washington, D. C. 20006
Attorneys for the Amicus Curiae

LAWRENCE B. KRAUS
General Counsel
RICHARD B. BERMAN
Labor Relations Counsel
Chamber of Commerce of the
United States of America
1615 H Street, N. W.
Washington, D. C. 20006

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21. "Consequences cannot alter statutes, but may help to fix their meanings." Cardozo, *The Growth of the Law*, p. 75, 112.

MOTION FILED

DEC 26 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-260

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Petitioners,

v.

SANTA FE TRANSPORTATION COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

AMOS ALTER
DONALD A. DERFNER
JUSTIN J. FINGER
EDWARD N. LEAVY
JOY MEYERS
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the Anti-Defamation League of B'nai B'rith, respectfully move this Court for leave to file the accompanying brief *amicus curiae*, in support of the position of Petitioners to the extent that they seek (1) a reversal of the judgment below dismissing for lack of jurisdiction their claim under 42 U.S.C. §1981 on the ground that the section confers no actionable rights on white persons, and (2) a determination that white claimants

are entitled to the same protection against racial discrimination under Title VII of the Civil Rights Act of 1964 as are Blacks.

Consent to file the attached brief has been sought from the parties. Petitioners and Respondent Teamsters Freight, Tank Line and Automobile Industry Employees, Local Union 988, have granted such permission; however, Respondent Santa Fe Transportation Company has refused to consent. It is therefore necessary to request permission of this Court under Rule 42.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the nature and quality of the rights of all people, and in assuring that all people are treated equally, regardless of their religion or race.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this and other courts urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g., Shelley* v. *Kraemer,* 334 U.S. 1 (1947); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.,* 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S.

229 (1969); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) and *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

As one of the nation's oldest civil rights and human relations agencies, and one which has been concerned with the rights of all people, be they majority or minority, the Anti-Defamation League respectfully offers this Court its accumulated experience on the issues raised by this case.

It seeks to submit the accompanying brief because it believes that the decision below, which narrows the protection afforded white people against racial discrimination, does violence to the concept of equality under law for all people.

Respectfully submitted,

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

AMOS ALTER
DONALD A. DERFNER
JUSTIN J. FINGER
EDWARD N. LEAVY
JOY MEYERS
Of Counsel

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BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICUS CURIAE*

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

AMOS ALTER
DONALD A. DERFNER
JUSTIN J. FINGER
EDWARD N. LEAVY
JOY MEYERS
Of Counsel

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BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH *AMICUS CURIAE*

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith, *amicus curiae,* in support of the position of petitioners to the extent that they seek (1) a reversal of the judgment below dismissing for lack of jurisdiction their claim under 42 U.S.C. §1981 on the ground that the section confers no actionable rights on white persons, and (2) a determination that white claimants are entitled to the same protection against racial discrimination in employment under Title VII of the Civil Rights Act of 1964 as are Blacks.

Questions Presented

(1) Whether 42 U.S.C. §1981 accords rights and standing to sue to white persons alleging discrimination on the basis of their race.

(2) Whether white claimants are entitled to the same protection against racial discrimination under Title VII of the Civil Rights Act of 1964 are Blacks.

Interest of the *Amicus*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the nature and quality of the rights of all people, and in assuring that all people are treated equally, regardless of their religion or race.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this and other courts urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1947); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) and *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).

It submits this brief because it believes that the decision below, which narrows the protection afforded white people against racial discrimination, does violence to the concept of equality under law for all people regardless of race.

Statement of the Case

The two petitioners, both whites, and a third individual, a Black, were employees of the respondent, Santa Fe Transportation Company ("Santa Fe"). On September 26, 1970, respondent charged them all with misappropriation of certain company property. (App. p. 6) On October 2, 1970, petitioners were discharged by Santa Fe, while the Black employee was not discharged. (App. pp. 6-7) Petitioners thereafter initiated these proceedings in the United States District Court for the Southern District of Texas, claiming in their second amended complaint that the "Defendant imposed a more severe disciplinary sanction against them because of their race." (App. p. 38) They sought relief under Title VII of the Civil Rights Act of 1964, as amended, and under 42 U.S.C. §1981.

The district court dismissed the second amended complaint, with prejudice (App. pp. 103-107), holding that "the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which

Title VII relief may be granted." (App. p. 107) The court also held that "§1981 is inapplicable to white persons." (App. p. 104)

The Court of Appeals for the Fifth Circuit affirmed in a *per curiam* opinion (513 F.2d 90 [5th Cir. 1975]) expressly agreeing with the contention that §1981 "confers no actionable rights on white persons" and that "an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII."

A petition for writ of certiorari to review the judgment of the Court of Appeals was granted by this Court on November 3, 1975.

ARGUMENT

White victims of racial discrimination are entitled to the same rights and standing to sue under the Civil Rights Acts of 1866 and 1964 as are members of a minority race.

In the last quarter century, our nation, spearheaded by this Court, has been engaged in an effort to make the twin ideals of equality under law and equality of opportunity a living reality by eliminating once and for all the blight of racial discrimination. The Civil Rights Act of 1866, resurrected by this Court in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and the Civil Rights Act of 1964 provide a formidable arsenal of weapons against such discrimination, particularly in the employment area.

Through these statutes and court decisions interpreting them, much has been accomplished in sensitizing the business community to the many, often subtle, forms of discrimination which have in the past barred the way to the employment and advancement of minority group members. As a result of the activities of various governmental agencies such as the Office of Contract Compliance and the Equal Employment Opportunity Commission, affirmative action programs containing goals and timetables for the hiring and promotion of minority group members are now common.

In the process of remedying the effects of past evils, however, we have seen the development of a new form of racial discrimination in which white people are now the victims. This distinctly modern form of discrimination, if more subtle and less pervasive, is no less destructive of individual aspirations, no less a divider of society and no less a moral wrong than the racism of the past.

In the case at bar and others to be decided this term, this Court will determine whether equality under law is indeed to be the rule for all people. At a time of declining job opportunities the choices are not easy ones. But anything less than a reaffirmation of the right of the individual to equal treatment under law, whatever his or her race, can only lead to increased racial tensions and to a loss of faith in the rule of law itself, with untold damage to the fabric of our society.

§1981 is applicable to white victims of racial discrimination.

The decision below, excluding white victims of racial discrimination from the protection of §1981, is required neither by the plain wording of the statute nor its legislative history. That section, derived from §1 of the Civil Rights Act of 1866, provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and actions of every kind, and no other."

§1981 sets forth at its very outset who shall be the beneficiaries of its provisions: "All persons within the jurisdiction of the United States". There follows a specification of the rights conferred upon "all persons", namely, the right to make and enforce contracts, to sue, be parties, give evidence, etc. The phrase "as is enjoyed by white citizens" sets forth the standards for determining the quality and extent of the enumerated rights conferred by the statute. That standard was framed in terms of the most favored group in 1866, *i.e.*, white citizens. Thenceforth, these rights were to be enjoyed to the same extent by "all persons".

The legislative history of §1981 supports this interpretation. Indeed, §1 of the Civil Rights Act of 1866 expressly

referred to "citizens of every race and color".[1] Lyman Trumbull,[2] Chairman of the Senate Judiciary Committee, who was the manager and principal author of the Civil Rights Act of 1866, made undisputably clear that the statute was to apply to white persons as well as Black:

> "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what fact can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?" (Cong. Globe, 39th Cong., 1st Sess. 599 [1866].)

While this statement predated the House of Representatives' addition of the words "as is enjoyed by white citizens" to the bill, this addition did not constrict its scope.

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1. In 1870, the 1866 statute was reenacted with revised wording which substituted for the words "of every race and color" the present words "within the jurisdiction of the United States." See *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695-6 (1898). This Court there stated that the change in wording "was not considered as making the section, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form . . ."

2. This Court has heretofore given Senator Trumbull's remarks substantial weight in construing the Civil Rights Act of 1866. (*Jones* v. *Alfred H. Mayer Co., supra,* at 429-30.)

As Senator Trumbull observed upon the bill's return to the Senate:

> "I quite agree with the Senator from West Virginia that these words ['as is enjoyed by white citizens'] are superfluous. I do not think they alter the bill . . . We did not think it worthwhile to send the bill back just because these words were inserted by the House . . . [A]s in the opinion of the committee which examined this matter, they did not alter the meaning of the bill, the committee thought it proper to recommend a concurrence, and I hope the Senate will concur in it." (Cong. Globe, 39th Cong. 1st Sess. 1413 [1866].)

The debates in the House of Representatives do not suggest a different interpretation. On the contrary, the following statement by James F. Wilson, the bill's floor manager, makes clear his understanding that the words "as is enjoyed by white citizens", which were added on his motion, were not intended to restrict the bill's coverage to Black people alone:

> "Mr. Speaker, if all our citizens were of one race and one color we would be relieved of most of the difficulties that surround us. This bill would be almost, if not entirely, unnecessary, and if the States, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate, so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men." (Cong. Globe, 39th Cong., 1st Sess. 1118 [1866].)

While the Civil Rights Act of 1866 was enacted pursuant to the power invested in Congress by the 13th Amendment, that source of authority does not establish a Congressional intent to limit the statute's applicability only to persons of the Black race. Though born out of the slavery of Black people, the 13th Amendment itself is universal in its language and applicability. See *Civil Rights Cases*, 109 U.S. 3, 22, 35 (1883); *Hodges* v. *United States*, 203 U.S. 1, 16-17 (1906); *Bailey* v. *State of Alabama*, 219 U.S. 219, 240-241 (1910).[3]

In any event, the 1870 reenactment of the statute was passed pursuant to the provisions of the 14th Amendment which this Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) and *United States* v. *Wong Kim Ark*, 169 U.S. 649, 695 (1898) characterized as "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality." Indeed, as this Court observed in *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, n. 11 at 439 (1973) the "changes in wording" in the 1870 Act "may have reflected the language of the 14th Amendment".[4]

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3. In *Hodges*, the 13th Amendment was characterized as ". . . the denunciation of a condition, and not a declaration in favor of a particular people. It reaches every race and every individual." Likewise, in *Bailey*, Mr. Justice Hughes described the Amendment as "a charter of universal civil freedom for all persons of whatever race, color, or estate . . . ." While *Jones* v. *Alfred H. Mayer Co., supra*, overruled *Hodges* to the extent its holding rested upon an overly restrictive "concept of Congressional power under the Thirteenth Amendment" (392 U.S. n. 78 at 441), *Jones* did not denigrate the Amendment's universal applicability.

4. While the 14th Amendment speaks in terms of state action, statutes enacted pursuant to the authority of that Amendment are not necessarily so limited. *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975), this Court expressly held that "§1981 affords a federal remedy against discrimination in private employment on the basis of race."

The decision below which deprives §1981 of its applicability to "all persons" regardless of race, not only runs counter to the plain language of the statute, it needlessly creates a constitutionally suspect racial classification under the due process clause of the 5th Amendment.[5] No such interpretation was intended by Congress in 1866. No such interpretation is legally appropriate or socially permissible in our time.

White claimants are entitled to the same protection against racial discrimination under Title VII as are Blacks.

The District Court dismissed petitioners' claim under Title VII for failure to "raise a claim upon which Title VII relief may be granted." The Court of Appeals affirmed on the same basis. It is not clear whether this holding was predicated upon the fact that petitioners failed to allege their innocence of the felony charged, or whether the courts below held that because petitioners are members of the white race they somehow have a lesser degree of protection under Title VII.

5. In *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), it was observed:

> "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."

Accordingly, under the 5th Amendment, as under the 14th, classifications on the basis of race are "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative purpose." *McLaughlin* v. *Florida*, 379 U.S. 184, 191-92 (1964). While providing protection against discrimination to newly freed Black slaves unquestionably constituted a compelling legislative purpose, there would have been no justification even in 1866 for excluding members of other races from the same protection.

This *amicus* does not take a position with respect to the rights, if any, of alleged felons to make claims of discrimination under Title VII. It asks only that this Court make clear that whatever protection is afforded such persons is available without regard to the race of the claimant.

Any disparity in the protection afforded by Title VII, based upon the claimant's race—even where he or she happens to be accused of a felony—would do violence to the Congressional mandate prohibiting discrimination against "any individual . . . because of such individual's race . . ." 42 U.S.C. 2000e-2(a)(1).[6]

As this Court stated in discussing Title VII, both in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) and in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 800 (1973):

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

6. §2000e-2. (a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Conclusion

For the foregoing reasons, this *amicus* respectfully urges this Court to hold that the rights afforded victims of racial discrimination under the Civil Rights Acts of 1866 and 1964 are the same regardless of their race.

Respectfully submitted,

LARRY M. LAVINSKY
300 Park Avenue
New York, New York 10022

ARNOLD FORSTER
315 Lexington Avenue
New York, New York 10016

Attorneys for Anti-Defamation League of B'nai B'rith

AMOS ALTER
DONALD A. DERFNER
JUSTIN J. FINGER
EDWARD N. LEAVY
JOY MEYERS
Of Counsel

MOTION FILED

DEC 17 1975

IN THE

Supreme Court of the United States

October Term, 1975
No.75-260

L.N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION COMPANY and
TEAMSTERS FREIGHT TANK LINE AND
AUTOMOBILE INDUSTRY EMPLOYEES,
LOCAL UNION NO. 988,
Respondents

**On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND ANNEXED BRIEF OF THE AMERICAN JEWISH COMMITTEE

SAMUEL RABINOVE
Attorney for the
American Jewish Committee
165 East 56th Street
New York, New York 10022

ALAN ROY HOLLANDER
Of Counsel

University Press at Buffalo

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IN THE

Supreme Court of the United States

October Term, 1975
No.75-260

L.N. McDONALD, *et al.*,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION Co., *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Jewish Committee hereby respectfully moves this Court for leave to file the accompanying brief *amicus curiae*. The consent of counsel for the petitioners and for the respondent union has been obtained. Consent of counsel for the respondent company was requested, but denied.

The American Jewish Committee is a national organization of approximately 40,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization, however, that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed, or national origin. For this reason, the American Jewish Committee has vigorously supported the extension of equal opportunity to all individuals. Specifically,

we have filed numerous briefs as *amicus curiae* in cases before this Court, as well as courts below, in opposition to discrimination based on race in education, housing, employment, public accommodations, and private clubs. While most of these cases have dealt with discrimination against black citizens, not all of them have, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974), which addressed discrimination in educational opportunity against Chinese-American public school students.

Petitioners will necessarily concentrate on demonstrating that they have made a claim of racial discrimination as this demonstration will have to be successful before this Court considers the question of whether or not a white person can seek judicial relief from such discrimination. The accompanying brief *amicus curiae* deals generally with this question and leaves to counsel for the parties the argument concerning the particulars of the instant case.

The lower courts in the instant case, in concluding that 42 U.S.C. § 1981 is inapplicable to whites, relied upon cases which support such a conclusion only by way of dicta. The recent case of *Hollander v. Sears, Roebuck and Co.*, 392 F. Supp 90 (D. Conn. 1975) which was decided two months before the appellate decision in the instant case was not considered. The *Hollander* court was the first court to review the legislative history of 42 U.S.C. § 1981 and found adequate support in the Congressional debates to conclude that white persons have standing to sue under the statute. In order to ensure that the reasoning and analysis of this case is considered by this Court, the American Jewish Committee has presented in its brief a lengthy excerpt from this case within the framework of the arguments presented to the *Hollander* court.

In addition, the American Jewish Committee finds it appropriate to bring to this Court's attention a district court holding that a white person does not have standing to sue under 42 U.S.C. §§ 2000e *et seq*. This issue of a white person's standing to sue under this statute was properly not reached by the lower courts in the instant case but will be before this Court for consideration if this Court finds a claim of racial discrimination has been made. The accompanying brief presents

portions of the Congressional debates which clearly demonstrate that a white person has standing to sue under 42 U.S.C. §§ 2000 e *et seq*. for consideration by this Court in the event this Court reaches this issue.

The underlying concern of the American Jewish Committee is that under the law there should be no differentiation based on race and that the law should not be construed to apply to one race and not another. This concern has a constitutional dimension. The accompanying brief therefore presents the argument that it would be violative of due process to construe either 42 U.S.C. § 1981 or 42 U.S.C. §§ 2000 e *et. seq.* as providing only a cause of action for non-whites.

The instant case may be decided upon a finding that the petitioners have not made a claim of racial discrimination. An adequate presentation of the arguments concerning this facet of the case can be made by counsel for the parties. The *amicus curiae* brief presents the full scope of the issues which the American Jewish Committee feels may not be presented or may be inadequately presented by counsel for the parties and which will be reached by this Court if it finds a claim of racial discrimination in the instant case.

For the foregoing reasons, the American Jewish Committee respectfully requests that this motion be granted.

December 15, 1975

Respectfully Submitted,

SAMUEL RABINOVE
Attorney for the
American Jewish Committee
165 East 56th Street
New York, New York 10022

IN THE

Supreme Court of the United States

October Term, 1975
No.75-260

L.N. McDONALD, *et al.*,
Petitioners

v.

SANTA FE TRAIL TRANSPORTATION CO., *et al.*,
Respondents

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

BRIEF OF
THE AMERICAN JEWISH COMMTTEE
AS AMICUS CURIAE

This brief is submitted by the undersigned *amicus curiae* conditionally upon the granting of the motion for leave to file to which it is attached.

INTERESTS OF THE AMICUS CURIAE

The interest of the *amicus* is set forth in the attached motion for leave to file.

OPINION BELOW

The opinion of the Court of Appeals is reported at 513 F.2d 90.

STATEMENT OF THE CASE

Petitioners, discharged from employment after being accused by respondent company of having misappropriated certain of respondent company's property, initiated an action under 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981 in the United States District Court for the Southern District of Texas, claiming that they were discharged on account of their race, which is white, because a similarly accused black employee was not discharged. Judgment was entered against the discharged employees who appealed.

The Court of Appeals held that 42 U.S.C. § 1981 "confers no actionable rights upon white persons," and finding that petitioners had failed to allege that they were falsely charged, held "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. § § 2000e *et seq*."

SUMMARY OF ARGUMENT

The Court of Appeals held that the plaintiffs (the petitioners here) could not claim that they were discriminated against on account of their race based upon the allegations in their complaint. Although the court also held that white persons cannot sue under 42 U.S.C. § 1981, this holding is merely dictum. Even if the plaintiffs were not white, their claim under 42 U.S.C. § 1981 would have been dismissed because, in order to maintain an action under the statute, it is necessary to make a claim of racial discrimination.

If this Court finds that a claim of racial discrimination cannot be based upon the allegations in the complaint, there will be no basis upon which to decide whether or not a white person can sue under 42 U.S.C. § 1981. On the other hand, if this Court were to find that a valid claim of racial discrimination has been made, the question of whether or not a white person can sue under the statute would be properly before this Court.

The courts that have stated that whites cannot sue under 42 U.S.C. § 1981 seem to have assumed that the phrase "as is enjoyed by white citizens" contained in the statute indicates that only non-whites were to be protected under the statute. The legislative history of the statute demonstrates, though, that the phrase does not function to exclude white persons from the protection of the statute, but to ensure that protection under the statute extends only to persons denied the rights conferred on the basis of race.

Although the lower courts in the instant case did not need to consider the question of whether or not a white person can sue under 42 U.S.C. § § 2000e *et seq*. since the courts found no claim of racial discrimination, the question ought to be cor.sidered by this Court if a claim of racial discrimination is found since a district court has held that a white person cannot sue under this act. This holding should be expressly overruled since the legislative history of the act demonstrates that although the act was passed in response to the denial of equal opportunity to non-whites, the Congress intended that the act would protect whites, as well as non-whites, from racial discrimination in the areas covered under the act.

If this Court were to find that either 42 U.S.C. § 1981 or 42 U.S.C. § § 2000 e *et seq*., or both prohibit racial discrimination against non-whites, but not against whites, enforcement of either statute would unjustifiably discriminate against whites so as to be violative of due process. The proper course for this Court to follow would be to interpret the statutes so as to provide standing for whites, and thereby, avoid having to render the statutes invalid.

ARGUMENT

POINT I

THE PHRASE "AS IS ENJOYED BY WHITE CITIZENS," AS PART OF 42 U.S.C. § 1981, DOES NOT FUNCTION TO EXCLUDE WHITE PERSONS FROM THE PROTECTION OF THE STATUTE, BUT TO ENSURE THAT PROTECTION UNDER THE STATUTE EXTENDS ONLY TO PERSONS DENIED THE RIGHTS CONFERRED ON THE BASIS OF RACE.

The Court of Appeals in this case affirmed the District Court's holding that 42 U.S.C. § 1981 (hereinafter "Section 1981") confers no actionable right upon white persons. The appellate court based its affirmance on four cases which, actually, provide no support for such a conclusion, except, perhaps, by way of dicta. These cases do not involve claims of racial discrimination, as is involved in the instant case, and therefore, support only the conclusion that a white person who suffers no detriment due to his race does not have standing to sue under Section 1981.

In *Perkins v. Banster*, 190 F.Supp. 98 (D. Md. 1960), aff'd 285 F.2d 426 (4th Cir. 1960) the court states: "Perkins has explained the rather unclear provisions of the complaint and has indicated that his claims are for false arrest or false indictment or malicious prosecution or denial of due process, and also for slander." 190 F.Supp. at 99. The case was dismissed because the court found the action to be "frivolous." 190 F.Supp. at 100. In *Kurylas v. U.S. Department of Agriculture*, 373 F.Supp. 1072 (D. D.C. 1974), "[t]he Court concludes that the plaintiff's allegations of discrimination due to his national origin is insufficient to sustain a cause of action under § 1981 . . ." 373 F.Supp. at 1076. The court in *Van Hoomissen v. Xerox Corp.*, 368 F.Supp. 829 (N.D. Cal. 1973) followed the reasoning in *N.O.W. v. Bank of California*, 5 E.P.D., ¶ 8510 (N.D. Cal. 1973) that " . . . the Court cannot allow a white plaintiff standing under Section 1981 when he has suffered a

deprivation which was not the result of his race." 368 F.Supp. at 839. The plaintiff in *Van Hoomissen, supra*, was only " . . . suing defendants for various alleged acts of retaliation . . . The alleged retaliation was in response to plaintiff's asserted attempts to change the hiring policy of Xerox, which he believe[d] discriminate[d] against Mexican Americans . . ." 368 F.Supp. at 831. In *Ripp v. Dobbs Houses, Inc.*, 366 F.Supp. 205 (N.D. Ala. 1973), the court does state that " . . . a white plaintiff cannot rely on 42 U.S.C. § 1981 . . ." 366 F. Supp. at 211, but this is merely dictum. Even if the plaintiff in *Ripp* had been non-white, the case would have been dismissed because, as the court found, the " . . . plaintiff makes no complaint that he has suffered any detriment on account of his race." 366 F.Supp. at 208. The plaintiff was attempting to represent other employees who were, allegedly, subjected to discrimination.

The same analysis can be applied to the other three cases relied upon by the appellate court in the instant case. Even if the plaintiffs in those cases were non-white, those cases would have been dismissed because the necessary claim of racial discrimination had not been made. The plaintiffs in the instant case have alleged that they were discriminated against because of their race.

The appellate court, though, did not find the allegation of racial discrimination sufficient. In its discussion of the applicability of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (hereinafter "Title VII") to the plaintiffs' claim, the court found that the plaintiffs could not claim that they were discriminated against on account of their race based upon the allegations made in their complaint. If this legal finding is correct, then even if the plaintiffs were non-white, the court would have dismissed their claims under Section 1981. Therefore, the court's statement that whites cannot sue under Section 1981 is merely dictum. If this court finds that a claim of racial discrimination cannot be based upon the allegations in the complaint, there will be no basis upon which to decide whether or not a white person can sue under Section 1981. On the other hand, if this Court were to find that a valid claim of racial discrimination has been made, the

question of whether or not a white person can sue under Section 1981 would be properly before this Court.

The courts that have stated that whites cannot sue under Section 1981 seem to have assumed that the phrase "as is enjoyed by white citizens" contained in the statute indicates that only non-whites were to be protected under the statute. This assumption was demonstrated to be incorrect in *Hollander v. Sears, Roebuck and Co.*, 392 F.Supp. 90 (D. Conn. 1975) where the court found that the legislative history of § 1 of the Civil Rights Act of 1866,[1] from which Section 1981 was ultimately derived makes it " . . . quite clear that § 1981 should not be read as only providing a cause of action for non-whites." 392 F.Supp. at 94. The *Hollander* court reached this conclusion through the following analysis:

> As originally passed by the Senate, the bill which eventually became § 1 of the 1866 Act did not contain the questioned phrase. It was added by amendment in the House. *See Georgia v. Rachel*, 384 U.S. 780, 791 . . . (1966). During the Senate debates on that original bill, Senator Lyman Trumbull of Illinois, the floor manager, made it quite explicit that the bill was intended to protect the rights of whites, as well as blacks. In response to a charge by one of the bill's opponents that it was

[1] Act of April 9, 1866, c. 31, §1, 14 Stat. 27, re-enacted by § 16 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, § 16, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§ 1981 and 1982.

Section 1 provided in relevant part:

> "[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

outrageous to provide federal protection for blacks that had never been accorded whites, Senator Trumbull stated:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?
>
> Cong. Globe, 39th Cong., 1st Sess. 599 (1866).

Of course, this statement was made before the House amended the bill to include, *inter alia*, the phrase "as is enjoyed by white citizens." However, when the bill was resubmitted to the Senate for consideration of the House amendments, the following colloquy between Senator Trumbull and Senator Van Winkle of West Virginia:

> Mr. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words "and such citizens." As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have

the same right to make and enforce contracts," &c., "as is enjoyed by white citizens." It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.

Mr. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. *I do not think they alter the bill.* I think the bill would be better without them, but they have been adopted by the House of Representatives. *We did not think they altered the meaning of the bill*; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and *as in the opinion of the committee which examined this matter they did not alter the meaning of the bill*, the committee thought proper to recommend a concurrence, and I hope the Senate will concur in it. (Emphasis added). Cong. Globe, 39th Cong., 1st Sess. 1413 (1866).

Without further debate, the amendment was approved by the Senate and ultimately the entire bill, as amended, was passed. Thus, the history of this legislation in the Senate clearly reflects an understanding that the act was to protect the rights of all citizens notwithstanding the amendatory language inserted by the House. *Hollander v. Sears, Roebuck and Co., supra*, 392 F.Supp. at 92-93.

The reason for the addition of the phrase given in the House by James F. Wilson of Iowa, the bill's floor manager was that " . . . it was thought by some persons that unless these qualifying words were incorporated in the bill, [the rights conferred] might be extended to all citizens, whether male or female, majors or minors." Appendix to Cong. Globe, 39th Cong., 1st Sess. 157 (1866). The phrase was intended only "to emphasize the racial character of the rights being protected."

Georgia v. Rachel, 384 U.S. 780 at 791 (1966). In other words, the phrase was added to ensure that protection under the statute extended only to persons denied the rights conferred on the basis of race and not to exclude white persons from the protection of the statute.

The court in *Kentucky v. Powers*, 139 F. 452 at 495 (Cir.Ct. E.D.Ky. 1905), rev'd 201 U.S. 1 (1906) provided the following analysis:

> Section 1977 [now 1981], so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons. The persons on whom it confers rights are 'all persons within the jurisdiction of the United States.' It is only when it comes to define the rights which the section confers that they are referred to as such 'as is enjoyed by white citizens.' (dictum)

This analysis of the language of the act should be sufficient, in and of itself, to demonstrate that Section 1981 protects whites, as well as non-whites. As the legislative history fully supports this analysis, this Court should hold that whites have the right to sue under Section 1981.

POINT II

ALTHOUGH 42 U.S.C. §§2000e ET SEQ. WAS PASSED IN RESPONSE TO THE DENIAL OF EQUAL OPPORTUNITY TO NON-WHITES, THE CONGRESS INTENDED THAT THE ACT WOULD PROTECT WHITES, AS WELL AS NON-WHITES, FROM RACIAL DISCRIMINATION IN THE AREAS COVERED UNDER THE ACT.

Although the lower courts in the instant case did not need to consider the question of whether or not a white person can sue under Title VII since the courts found no claim of racial discrimination, the question ought to be considered by this Court if a claim of racial discrimination is found since a district

court has held that a white person cannot sue under Title VII. The court in *Haber v. Klassen*, 10 FEP Cases 1446 at 1447 (N.D. Ohio 1975) dismissed the case of a white plaintiff stating that " . . . the discrimination these statutory provisions were designed to eliminate were aimed at racial minorities . . ."[2]

Although the *Haber* court quoted from this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), it completely disregarded this Court's statement that "[d]iscriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed." 401 U.S. at 431. This Court's interpretation of Congressional intent is adequately supported by the debates.

Although Title VII was passed in response to the denial of equal employment opportunity for minorities, the Congress was not unaware of discrimination against whites. On April 6, 1964 Senator Holland quoted in Congress from an interview by *U.S. News and World Report* of a black businessman who owned and operated a business with annual gross sales of $10 million and which had 600 employees:

> *"Question*: Would you say, then, that racial discrimination is found among all races?
> *Answer*: It is a universal human trait – and people use it, if they can do so at a profit. When it becomes unprofitable they forget it. Here in our organization, it pays the white people not to discriminate against the Negro, and they don't. But the Negroes will discriminate against the white people because they are trying to get the white people out of some of the well-paying jobs and put Negroes in them." 110 Cong. Rec. 7017 (April 6, 1964)

Furthermore, many members of Congress were concerned that whites might be discriminated against as a result of an

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[2] The statutory provision involved in *Haber v. Klassen, supra*, is 42 U.S.C. §2000e-16(a) which reads in relevant part: "All personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race."

employer's efforts to comply with the requirements of Title VII. Senator Clark, one of the two floor managers of the Civil Rights Act of 1964 stated in response to this concern that the Equal Employment Opportunity Commission (hereinafter "EEOC") " . . . has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the act, including *the obligation not to discriminate against whites.*" (Emphasis added) 110 Cong. Rec. 7218 (April 8, 1964). The EEOC, which was created under Title VII and empowered to investigate charges of discrimination and to determine if reasonable cause exists to believe that the charge is true, has recognized that an employer has such an obligation by finding in a recent case reasonable cause to believe that an employer and employment agency violated Title VII when, because the employer requested only referral of minority group applicants the employment agency failed to act on an application submitted by a white individual. *EEOC Decision 75-268*, 10 FEP Cases 1502 (1975). In another decision the EEOC found reasonable cause to believe that the respondent violated Title VII by failing to rehire a white professor. *EEOC Decision 74-106*, 10 FEP Cases 269 (1974).

In view of the above, the *Haber* court's holding that a white person is not protected under Title VII is clearly erroneous. Therefore, this Court should expressly overrule this holding if a claim of racial discrimination is found in the instant case and it becomes necessary to consider whether or not a white person can sue under Title VII.

POINT III

ENFORCEMENT OF A STATUTE THAT PROHIBITS RACIAL DISCRIMINATION AGAINST NON-WHITES BUT NOT AGAINST WHITES WOULD UNJUSTIFIABLY DISCRIMINATE AGAINST WHITES SO AS TO BE VIOLATIVE OF DUE PROCESS.

In *Schneider v. Rusk*, 377 U.S. 163 at 168 (1964), this Court stated that " . . . while the Fifth Amendment

contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling v. Sharpe*, 347 U.S. 497, 499 [1954]." In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court followed this reasoning and applied the analytic techniques developed in Fourteenth Amendment equal protection cases to a claim arising under the due process clause of the Fifth Amendment.

Classifications based upon race, being inherently suspect, must be subjected to close judicial scrutiny. It is evident, though, that even under a traditional rational-basis analysis, a statute prohibiting racial discrimination against members of one race, while not providing the same protection against members of another race, would have to be held invalid. There can be no constitutional justification for such invidious discrimination. The proper course for this Court to follow would be to interpret the statutes so as to provide standing for whites, and thereby, avoid having to render the statutes invalid.

CONCLUSION

The legislative history of both Section 1981 and Title VII compel a holding that whites, as well as non-whites, are protected against racial discrimination by these statutes. Due process considerations necessitate such a holding if the statutes are not to be held invalid.

For the reasons set forth herein, the decision below should be reversed.

Respectfully Submitted,

SAMUEL RABINOVE
Attorney for the
American Jewish Committee
165 East 56th Street
New York, New York 10022

ALAN ROY HOLLANDER
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD, *et al.*,

Petitioners,

v.

SANTA FE TRANSPORTATION CO., *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

JACK GREENBERG
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereby moves for leave to file the attached brief as *amicus curiae.*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation

before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court. The proposed brief is submitted in support of respondents though advancing reasons somewhat different than those relied on by the courts below.

WHEREFORE, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

JACK GREENBERG
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019
Attorneys for Amicus Curiae

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Argument

All parties to this case, as well as the courts below, agree that white employees alleging discrimination on the basis of race may sue under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e.[1] The procedural requirements for a Title VII action were clearly met. Petitioner McDonald was discharged on October 2, 1970, and filed a grievance with the union on that day. The grievance was resolved against McDonald on October 29, 1970; the discharge only

[1] Appendix, pp. 4, 63, 105, 121-22.

became final upon the completion of grievance proceedings and the statutory period for filing a charge with the Equal Employment Opportunity Commission was tolled pending those proceedings.[2] Within the 180 days after the rejection of his grievance McDonald filed the requisite charges with the E.E.O.C. against both the company and the union.[3] Since this case was commenced as a class action, it was not necessary for petitioner Laird to file a separate Title VII charge. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975).[4] All the relief sought by petitioners in their Second Amended Complaint is within the broad remedial power of the court in a Title VII action.[5]

Since jurisdiction over this action exists under Title VII, it appears unnecessary to reach the more difficult and far reaching question of whether white employees may sue under 42 U.S.C. § 1981. If, however, the Court reaches that question and concludes that the phrase "as is enjoyed by white citizens" is "superfluous language, the substance of which would in no way alter the substance of the statute",[6] amicus believes that section 1981 must be construed not merely to protect whites against racial discrimination, as urged by petitioners and various amici, but also to prohibit all forms of invidious discrimination—on the basis of sex, age, national origin, etc.

[2] *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

[3] Appendix, pp. 115, 118. The 1972 amendments to Title VII extended the period of time within which to file such charges from 90 to 180 days, and apply to all pending litigation. See Pub. L. 92-261; 42 U.S.C. § 2000e-5(d); *Davis* v. *Valley Distributing Co.*, [illegible] F.2d [illegible] (9th Cir. 1975). 522 879

[4] If the class action aspect of the case were dismissed, Laird and other putative class members would be entitled as of right to intervene in this action although the relevant deadlines had by then passed. *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974). Whether Laird himself filed a timely charge with EEOC is a matter of dispute. Appendix, pp. 115-116.

[5] Appendix, pp. 41-42; 42 U.S.C. § 2000e-5.

[6] Brief of Petitioners, p. 25.

An allegation of racially motivated unequal discipline for identical misconduct, even criminal misconduct, by similarly situated employees states a cause of action under Title VII, regardless of whether the victim of the alleged discrimination is black or white. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), this Court held that an employer might justifiably refuse to hire an employee who engaged in unlawful acts against it "but only if this criterion is applied alike to members of all races." 411 U.S. at 804. If the employer in this case maintains a general policy of firing whites who steal but forgiving blacks who do so, or vice versa, such a policy would turn the theft into a pretext for mistreating the disfavored race. An allegation of such a policy might be supported by evidence that black employees known to the company to be as culpable as petitioners, and whose cases presented comparable mitigating factors, were not discharged. Other relevant evidence would include whether or not the employer had a practice of not hiring white applicants, of confining white employees to menial low-paying jobs, or of using tests with a disproportionate racial impact on whites. In a case, unlike this one,[7] where an employee challenged the good faith of an employer's conclusion that he was guilty and others innocent, of the misconduct charged, an inquiry might be required as to who was indeed culpable and what reason the employer had to believe otherwise.

[7] Since no such allegation was made, whether petitioner actually stole the anti-freeze, as he now appears to deny, need not be resolved.

As petitioners correctly recognize,[8] the cause of action accorded white employees under Title VII does not confer a right to thwart or deter actions by an employer, whether voluntary or court ordered, to end past discrimination against blacks or to overcome the continuing effects of such discrimination. If in the past a white employee has enjoyed the illicit benefits which are the windfall whites often receive when black employees are mistreated, such a white employee cannot complain if he is restored to his rightful place and is subject to the terms and conditions of employment which would have applied to him had there been no discrimination. An employer who defends a remedial policy is not obligated to establish, in the manner and detail which would have been required of a black employee suing for such a relief, that it had engaged in systemic racial discrimination or that the remedy it chose was that which would have been selected by a federal court. Such a requirement would frustrate the statutory policy of encouraging employers to voluntarily examine their employment practices and correct any discrimination. *Albemarle Paper Co.* v. *Moody*, 472 U.S. 405 (1975). Only the most courageous of employers would voluntarily implement a remedy if they did so at peril of liability to white employees should they fail to guess the precise remedy a court might years later find appropriate. An employer need only establish that the remedy it has chosen is reasonably related to a palpable claim of prior discrimination against blacks.

The expectations aroused by a past practice of discrimination in favor of whites may prompt a white employee to perceive injustice in an end to that favoritism.[9] The

[8] Brief of Petitioners, p. 42.

[9] "Title VII guarantees that all employees are entitled to the *same* expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), cert. dismissed 404 U.S. 1006 (1971).

extensive discovery in this action clearly indicates this is such a case. Although the complaint alleges there are "numerous" whites who have been subject to discriminatory dismissal,[10] the plaintiffs were the only employees fired at the Houston Terminal during the year involved.[11] It is not disputed that, on or about September 26, 1970, plaintiff McDonald, a truck driver whose route included the SMS Company, returned from its plant with approximately ten cases of antifreeze manufactured by that firm. On arriving at the Santa Fe Terminal, McDonald admittedly sold some of that antifreeze to a number of fellow employees, black and white, with the knowledge and assistance of plaintiff Laird, who was McDonald's supervisor. When the transaction came to light detectives employed by the Company investigated several dozen employees, including plaintiffs. McDonald conceded he had sold the antifreeze but maintained that the antifreeze was a gift to him from the SMS company;[12] the company concluded, however, that McDonald had stolen the antifreeze from SMS; and therefore dismissed McDonald for theft and Laird for failing to deal effectively with the problem of theft.[13] The black employee involved, Charles Jackson, was merely one of the employees who had purchased the antifreeze from McDonald; since McDonald had advised him the antifreeze was lawfully acquired there was never any question that Jackson was culpable.[14] Even if Jack-

[10] Appendix, p. 36.

[11] Id., p. 33.

[12] See deposition of L. N. McDonald, pp. 10-14.

[13] Appendix, p. 32.

[14] See deposition of Charles Adrian Jackson.

son had reason to suspect the goods were stolen, his purchase was manifestly less culpable than the actual theft, and was mitigated by his active cooperation with the company's investigation.[15] The only question of fact genuinely in issue is whether the company erred in concluding McDonald obtained the antifreeze by theft rather than as a gift, but such a mistake would not violate Title VII. Under the circumstances this case appears ripe for summary judgment. *Mourning* v. *Family Publications Service,* 411 U.S. 356, 362, n. 16 (1973).

Respectfully submitted,

JACK GREENBERG
BARRY L. GOLDSTEIN
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Amicus Curiae

[15] *Id.*